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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-523

EDDIE LEE FRASIER,
Petitioner.
-vs-
STATE OF INDIANA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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NO._____

EDDIE LEE FRASIER,)
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Petitioner.)
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

Eddie Lee Frasier, by his attorneys Ferd Samper, Jr., and James H. Voyles, Jr., prays that a writ of certiorari issue to review the judgment of the Supreme Court of Indiana in affirming the judgment of the Marion County Criminal Court, Division Four, Indianapolis, Indiana, upon his conviction of armed robbery in violation of Burns Indiana Statute Annot., §10-4709; IC 35-12-1-1.

OPINION OF THE SUPREME COURT OF INDIANA

The opinion of the Supreme Court of Indiana has been officially reported, and is cited in 312 N.E. 2d 77, 42 Ind. Dec. 167. A copy is reproduced herein as Appendix "A" to this petition.

JURISDICTION

1. The judgment of the Supreme Court of Indiana was entered on June 4, 1974.

2. A timely Petition for Rehearing was filed with the Clerk of the Supreme Court of Indiana on June 21, 1974. The petition for rehearing was denied on August 5, 1974. A copy is reproduced herein as Appendix "B."

3. The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, §1257 (3).

QUESTIONS PRESENTED

1. Were rights of the defendant under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States violated when the trial court allowed into evidence, over the objection of the defendant, the fruits of a warrantless search and seizure made without probable cause, subsequent to a non-custodial arrest and testimony as to the occurrences sequential to that illegal search and seizure?

2. Were rights under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States violated when witnesses were allowed to testify, over the objection of the defendant, to the product of an unduly suggestive police-conducted "show-up"?

3. Were rights under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States violated when a motion for a mistrial was denied

subsequent to the discovery that the bailiff of the trial court had made comments to the jury during its deliberation, and those comments were made out of the presence of the petitioner and his counsel and said comments were not only incorrect as to the law stated therein, but highly prejudicial to the defendant?

CONSTITUTIONAL PROVISIONS

Fourth Amendment to the Constitution of the United States reads as follows:

> "Unreasonable searches and seizures.--The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment to the Constitution of the United States Reads as follows:

"Criminal actions-Provisions concerning-Due process of law and just compensation clauses.--No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment to the Constitution of the United States reads as follows:

"Rights of the accused.--In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in favor, and to have the assistance of counsel for his defense."

Section 1 of Amendment 14 to the Constitution of the United States reads as follows:

> "Citizenship--Due process of law--Equal protection.--All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On the night of August 28, 1972, two men with guns robbed Mr. and Mrs. Larry Bosley in the Bosleys' apartment (Tr. p. 278). Moments after the robbery and in the neighborhood of the Bosleys' apartment, Deputy Sheriff Fields, an employee of the Marion County Sheriff's Department, without knowledge of the robbery, routinely stopped a Volkswagen with a noisy muffler (Tr. p. 232).

Using a flashlight to glance inside the car, the Deputy saw in plain view a "tire tool or pry bar protruding from a brown paper sack" lying on the floorboard between the two seats (Tr. p. 239).

On direct examination at the suppression hearing prior to trial, Deputy Fields testified that he had been checking security at a gasoline station when he observed a Volkswagen go past him (Tr. p. 187). That Volkswagen was exhibiting a loud muffler. Upon noticing the vehicle, he left the gasoline station with the intention of stopping the car and checking the muffler, the driver, and the driver's license of the driver (Tr. p. 188). When he pulled out behind the Volkswagen to first stop it, a district car running west of him had received a disturbance run at a certain address. The Deputy did not immediately stop the car because he thought he might be called to assist the other officer.

When this did not eventuate, he turned on his red light and spotlighted and stopped the Volkswagen (Tr. p. 189). At this time, he walked up to the Volkswagen and told the driver to proceed as he had been dispatched on this other run (Tr. p. 240). As he first looked in the car he saw the tire tool, but still told the driver to proceed. When he returned to his car, he was told to disregard the disturbance run. In the intervening time, the Volkswagen had not attempted to pull away from the scene. When he returned to the Volkswagen the second time, still without knowledge of the robbery, he flashed his light into the back seat. At this time the Deputy again noticed the brown sack on the floorboard between the seats. The Deputy told the petitioner and the driver of the Volkswagen to get out of the car (Tr. p. 201)

After the individuals left the car, the Deputy reached into the car and examined the contents of the paper sack. He looked into the car again and saw a blue overnight case and another brown sack therein (Tr. p. 202). After finding the articles in the paper sack, the Deputy walked to the rear of the car and stood in front of the two men and asked for identification from both of them. At this time, the driver took one step backwards and when his hand came back up he had an automatic in his right hand (Tr. p. 204). After hearing a "click" from the driver's weapon, the Deputy shot the driver (Tr. p. 208). During this entire period of time, the Deputy had no knowledge of the robbery (Tr. p. 211). The Deputy handcuffed the petitioner, lay him near the recently deceased and called headquarters (Tr. p. 214). When the Bosleys arrived the Petitioner was still handcuffed and about three or four feet from the body of the driver.

On cross-examination, Deputy Fields stated that the only reason for ordering the two men out of the car was his instinctive feelings aroused by the tool in the paper sack. He did not suspect a weapon (Tr. p. 250).

Two detective-sergeants employed by the Marion County Sheriff's Department also testified at the suppression hearing. Detective James Guilinger stated he arrived at the Bosleys' home at approximately 2:39 a.m. and found the couple handcuffed to a railing going to the upstairs of their apartment. The couple indicated to the sergeant that they had been robbed, but that they could not identify the men who had robbed them because the men wore masks over their faces (Tr. p. 270). Both suspects were white males wearing brown suede shoes and skin colored rubber gloves (Tr. p. 270).

Approximately 3:30 to 3:45 a.m. the detective took the couple to the scene of the shooting and told them that there had been an incident not far from their home and that the individuals involved in that incident might be the same people who robbed them. He led them to believe that the police had apprehended the people who had robbed them (Tr. pgs. 271-273).

The other detective-sergeant was William J. Roberts. Roberts received a call at home which informed him that Deputy Fields had shot a man (Tr. p. 256). When he arrived on the scene, the petitioner was lying on the ground inside a cordoned off area next to the deceased. There was a gun in the vicinity and blood on the deceased (Tr. p. 260). Roberts had conversation with the Bosleys and questioned them about the incident at their home. He told the Bosleys that the sheriff's

department had two suspects who matched the description given by the couple (Tr. p. 261). Mr. Bosley went to the car and identified an overnight case which had been reported stolen in the robbery (Tr. p. 262). The couple was asked if they knew an Eddie Lee Frasier. They responded that they did. However, they added that they could not identify the men who robbed them, but they did know an Eddie Lee Frasier (Tr. p. 263-264). Roberts stated that the man lying handcuffed on the ground was Eddie Lee Frasier (Tr. p. 263).

Larry Bosley, one of the victims of the robbery, stated that two men wearing masks -- apparently pillow cases -- were waiting at this home when he and his wife returned from the State Fair with the receipts from the booth they operated at the fair (Tr. p. 279). Although he

could not identify either of the men, he did give the officers a description of the clothing they were wearing (Tr. p. 280). At the pre-trial suppression hearing he testified that the officers had told him that the two men at the scene of the shooting were suspects in the robbery (Tr. p. 282). During the trial, Mr. Bosley stated that he based his identification of the petitioner from seeing him lying in the street next to the dead man (Tr. p. 523).

Karen Bosley, the other robbery victim, confirmed her husband's testimony. When the officer freed her, she was unable to give any description of the men who robbed them (Tr. p. 292). Detective Roberts asked her at the scene of the shooting whether the two men lying in the street were the ones that were in the apartment that night. She answered

in the affirmative (Tr. p. 301). The motion to suppress both the confrontation evidence and the physical evidence was overruled sequential to the above testimony. Later at the trial Mrs. Bosley confirmed her previous testimony and added that at the time of the robbery she thought she recognized one of the voices (Tr. p. 356).

Subsequent to the trial, while the jury was deliberating, the bailiff, James Fletcher, heard a knock on the jury room door. Inquiring, the bailiff learned that the jurors had a question concerning the result of sentencing on a finding of guilty on both charges (Tr. p. 16). The jurors wanted to know whether the sentences would run concurrently or consecutively (Tr. p. 16). Mr. Fletcher told them he would talk to the judge. Judge Wilson told Mr. Fletcher to tell the jurors that the question could not be answered. When he returned to the jury room, instead of

repeating the judge's comment, the bailiff told the jury that the sentencing of the defendant was up to the judge (Tr. p. 16). Petitioner's counsel, was not informed of this conversation until a few moments before the jury returned with the verdict. The jury ordered the highest possible sentence on both counts of the two count indictment: those sentences being thirty (30) years at the Indiana State Prison out of a possible penalty of ten (10) to thirty (30) years for the offense of armed robbery and ten (10) years at the Indiana State Prison out of a possible penalty of one (1) to ten (10) years for the offense of violation of the 1935 Firearms Act.

In summary, it is petitioner's contention that there are three important Constitutional questions presented by the

evidence. First, was any evidence admissable since the entire episode subsequent to the stopping of the Volkswagen for a loud muffler--not an offense which would result in a "custodial" arrest as the violator would normally sign a summons and be sent on his way--was the result of a search inspired solely by Deputy Fields' instinct and suspicions? Second, was not the on-the-scene identification unduly tainted by the statements of the police officer who made comments to the Bosleys? Third, is it not improper for a court official to make comments to the jury--comments improper as to the law states therein--out of the hearing of the Defendant and his counsel?

The Petitioner first raised the constitutional questions concerning the unlawful search and police show-up in a Motion to Suppress Evidence which was filed with the trial court prior to trial on December 26, 1972 (TR. P. 58). A hearing was held on the first day of the trial (Jan. 29, 1973), on this Motion to Suppress Evidence which motion was then overruled by the trial court (TR. P. 72). These same constitutional questions, along with the new issue concerning the comments by the court bailiff were presented in the Motion to Correct Error's (TR. P. 161-162). These same questions were then argued to the Supreme Court of Indiana on the direct appeal from the judgment of the trial court.

ARGUMENT

I.

Petitioner's first claimed constitutional error arises from the initial search of the automobile in which he was a passenger. This search was conducted by a Deputy of the Marion County Sheriff's Department. Petitioner objected prior to and during the trial to the admission of any of the fruits of that improper and unconstitutional search. Neither the trial court not the Supreme Court of Indiana agreed:

> Appellant believes that the many items of evidence found in the car should have been excluded from the trial because they were the fruits of an illegal, unconstitutional search. Mapp v. Ohio (1961) 367 U.S. 643, 81 S. Ct. 1684, 6 L.Ed. 2d 1081. Appellant's reasoning is that the Deputy had no probable cause to look into the paper sack and that the ensuing shootout and search of the car were caused by this original search. Thus, runs Appellant's argument, the tainted fruits of that search must be

excluded. We do not decide this point for the reason that we decide this issue pursuant to Gustafson v. Florida, (1973) 42 L.W. 4068, 414 U.S. 260, 94 S. Ct. 488, 38 L. Ed. 2d 456. Gustafson, supra, held that police officers effecting a valid custodial arrest for a traffic offense may thoroughly search the arrestee even absent the need to disarm or the need to seize evidentiary items which had been the justifications previously used for searches incident to valid arrests As the United States Supreme Court said in the companion case to Gustafson, supra: "It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment" United States v. Robinson, (1973) 42 L.W. 4055 at 4060, 414 U.S. 218 at 235, 94 S.Ct. 467 at 477, 38 L.Ed. 2d 427 at 441.

In Indiana an inadequate muffler is a misdemeanor. IC 1971, 9-8-6-36 (Burns' Ind. Stat. Ann. §47-2230 (Code Edition)). A Deputy Sheriff may arrest any person violating any law of this state in his presence. IC 1971, 35-1-21-1 (Burns' Ind. Stat. Ant. §9-1024 (1956) Repl.)) Acting within this authority, the Deputy asked for identification.

> Since he had the right to make an arrest and a search incident thereto, he had the right to make the considerable lesser intrusion of a request for identification. The ensuing assault on the Deputy validates the subsequent search of the car and seizure of the items therein. Chambers v. Maroney , (1970) 399 U.S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419; Brannon, Burton v. State, (1957) 236 Ind. 680, 142 N.E. 2d 215; Sisk v. State, (1953) 232 Ind. 214, 110 N.E. 2d 627.

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This is the Supreme Court of Indiana's justification for the search and seizure of all evidence. However, key facts are not clear and in proper context. These defects were presented to the Indiana Supreme Court in the petitioner's Motion for Rehearing. Mainly, the illegal search referred to by petitioner is the initial search of the paper sack located within the Volkswagen. But for this search of the paper sack, there would have been no killing, and neither would there have been any subsequent search and notification of the robbery victims.

The Indiana Supreme Court, in its majority opinion in this case has sanctioned this initial search of a paper sack seen on the floor of a 1965 Volkswagen with the theory that it was a search incident to a lawful arrest and therefore not violative of the Fourth and Fourteenth Amendments under this Court's decisions in U.S. vs Robinson, (1973) 94 S. Ct. 467, and Gustafson vs. Florida, (1973) 94 S. Ct. 488. This opinion thus creates an immediate expansion of the power of the police officers to search motorists.

The uncontroverted facts are that when Deputy Sheriff Fields first stopped the 1965 Volkswagen automobile he had no knowledge of the recent armed robbery at the Bosley home. His only authority to stop the car at that time was for a misdemeanor violation of one of the sections

of the Indiana Motor Vehicle Code which concerns the operation and maintenance of certain automotive equipment. When he saw part of a tire tool protruding from a paper sack lying on the floor of the automobile he ordered the occupants out of the car, opened the sack and discovered a tire tool, pink rubber gloves and a hunting knife. All three of these exhibits, along with numerous others discovered after the shooting incident were admitted at trial. Clearly the opening of the paper sack on the floor of the car constituted a search within the meaning of the Fourth Amendment. Chambers v. Maroney, (1970) 399 U.S. 42, 90 S.Ct. 1974, 26 L.Ed. 2d 419; Carroll v. U.S., (1925) 267 U.S. 132, 45 S.Ct. 280. The Indiana Supreme Court found, however, that although Deputy Fields had no probable cause at the time of the search of the sack, it was nevertheless proper solely on the

grounds that the defendant and his companion had been "arrested" on the loud muffler charge and that the Robinson and Gustafson decisions allow a police officer to "thoroughly search the arrestee" in this situation as a search incident to a lawful arrest. This holding misinterprets those decisions in two significant ways. First, Gustafson and Robinson concern the permissible scope of a search of a person incident to a custodial arrest, but they do not authorize, as the majority holding would seem to imply, a search of those sections of a car which lie beyond the area of control of the arrestee. Secondly, neither decision concerns the type of "arrest" with which we are confronted here.

On those occasions when a police officer in Indiana stops a motorist for a minor traffic violation, as we have here, the officer is not empowered to automatically

effect a full custodial arrest and haul a motorist off to the stationhouse. Both I.C. 1971, 9-4-1-130, being Burns §47-2307 and I.C. 1971, 9-4-1-131, being Burns §47-2308, require that the officer may only issue a summons to the offender and then must allow him to proceed on his way. It is only in the case of a serious traffic offense (Burns §47-2307 (2) to (5), or in the event a motorist refuses to promise to appear in court at a future date (Burns §47-2307(6) that the police may effect a full arrest and take the motorist to the police station for booking. In a normal traffic misdemeanor situation a police officer may only impose what may be termed a limited arrest for the purpose of issuing the summons and then must release the motorist from this limited form of custody.

Both the facts and language of Gustafson and Robinson specifically concern the type of traffic violations which requires

or allows an officer to effect a full custodial arrest. It is apparent from the opinions that the sole basis for the full scale search of the motorist was the full custodial type of arrest being effected in both of those situations.

> "The justification or reason for the authority to search incident to a lawful arrest rests quite as much on the need to disarm the suspect in order to take him into custody as it does on the need to preserve evidence on his person for later use at trial."

> "It is scarcely open to doubt that the danger to an officer is far greater in the case of the extended exposure which follows the taking of a suspect into custody and transporting him to the police station than in the case of the relatively fleeting contact resulting from the typical Terry type stop. This is an adequate basis for treating all custodial arrests alike for purposes of search justification." (Emphasis added.) U.S. v. Robinson (1973) 94 S.Ct. at 476.

In a footnote in Robinson this Court made a sharp distinction between the full custodial arrest with which it was concerned in that case, and what was characterized

by the Court as a "routine traffic stop, i.e. where the officer would simply issue a notice of violation and allow the offender to proceed." Fn. 6 at 477. The majority specifically stated that they were not deciding the constitutionality of searches incident to these routine traffic stops. It is precisely that type of limited arrest resulting from a routine traffic stop which faces us here, and while the Fourth Amendment does not prevent a full search incident to a lawful custodial arrest it does not condone a full search incident to a routine traffic stop where the police officer is not authorized to take the motorist into custody. The Supreme Court of Indiana justifies the search of the arrestee on the grounds of the full custodial nature of the arrest, but where, as here, there is no full custodial arrest the

justification and rationale allowing the search is obviously absent.

The United States Court of Appeals, District of Columbia Circuit, Bazelon, C.J., in overruling the conviction of Willie Robinson, Jr., by the United States District Court for the District of Columbia, clearly and ably discussed the difference between a full custodial arrest and a routine traffic stop, and the searches which may be made attendant thereto. Although the Court of Appeals holding was subsequently reversed by this Court in its decision on Robinson, the aforementioned footnote indicated this Court would not "reach the question." As that question is the linchpin issue in this cause, the Court of Appeals discussion should be awarded careful scrutiny.

> "In determining the extent to which the legitimate governmental

interest in insuring the safety of law enforcement officers justifies a search of the person incident to a lawful arrest, a distinction must be drawn between the "routine" traffic arrest--where the officer simply issues a notice of violation and allows the offender to proceed--and the more serious cases in which the officer effects an "in-custody" arrest in order to transport the traffic offender to the stationhouse for booking. Turning first to the "routine" traffic arrest, it seems evident that the dangers presented in that situation are to some extent similar to, and certainly no greater than those presented in the stop-and-frisk situations involved in TERRY and SIBRON. Like the investigatory stop, the routine traffic arrest is merely a brief on-the-street encounter. Moreover, the vast majority of traffic violators are law-abiding citizens. Indeed, '[v[ery few drivers can traverse any appreciable distance without violating some traffic regulation.' and as Chief Judge Fuld of the New York Court of Appeals has noted, "A motorist who exeeeds the speed limit does not thereby indicate any propensity for violence or iniquity, and the officer who stops the speeder has not even the slightest cause for thinking that he is in danger of being assaulted." PEOPLE V. MARSH, 20 N.Y. 2d 98,101, 281 N.Y.S. 2d 789, 228 N.E. 2d 783, 786 (1967).

This is not to say, of course, that a minor traffic stop can never erupt into

violence. On the contrary, whenever a police officer confronts a citizen on the street an element of danger is present. But as the stop-and-frisk cases make clear, the mere possibility of danger cannot justify any and all searches the officer may wish to conduct. The touchstone of the Fourth Amendment is reasonableness, and the possibility that a routine traffic stop might result in injury to the officer, although unquestionable real, is so remote that '[t]o allow the police to routinely search for weapons in all such instances would * * *constitute an 'intolerable and unreasonable' instrusion into the privacy of the vast majority of peaceable citizens who travel by automobile' PEOPLE V. SUPERIOR COURT OF YOLO COUNTY [Kiefer], 3 Cal. 3d 807, 91 Cal. Rptr. 729, 744, 478 P.2d 449, 464 (1970) (en banc).

We therefore conclude that the permissible scope of searches incident to routine traffic arrests, where there is no evidentiary basis for a search and where the officer intends simply to issue a notice of violation and to allow the offender to proceed, must be governed by the teaching of the Supreme Court as set forth in TERRY and SIBRON. Thus the most intrusive search the Constitution will allow in such situations is a limited patdown for weapons, and then only when there exist special facts or circumstances which give the officer reasonable grounds to believe that the person with whom he is dealing is armed and presently

dangerous."

UNITED STATES V. ROBINSON, 471 F.2d 1082, 1096-97 (CADC 1972). As is abundantly clear, the scope of a search incident to a routine traffic arrest should be severly restricted.

However, the Indiana Supreme Court's present interpretation of the Gustafson and Robinson decisions as allowing a full scale search of anyone who violates any traffic regulation, invites wholesale and groundless intrusions upon the personal privacy of thousands of motorists. Thus, under this interpretation the vast number of citizens who travel by automobile and who may be stopped for having a multitude of minor traffic offenses, are subject, without further authorization or circumstances, to not only having the contents of their wallets, pockets and pants cuffs examined by the police, but their entire vehicle as well.

There are only two real justifications

for searching a person and his surroundings after a valid arrest, whether the arrest be custodial in nature, or merely a limited, routine traffic stop under conditions where the defendant-suspect is not to be transported to the local jail or police headquarters. Those justifications are (1) where evidence of the crime charged or suspected must be secured, and (2) removal of any weapon the arrestee might seek to employ to resist arrest or effect an escape. The two categories are deserving of different treatment as their central purposes are not the same. The first category is the "search incident to a lawful arrest." The lawful arrest justifies the search for fruits, instrumentalities and evidence for which the arrest is made, but may only be made after the arrest is effected. The second category operates on a contrary basis. A broader time period than the time

for the search incident to a lawful arrest is created by the necessity of a police officer's protecting himself at all times and pursuant thereto a proctective, Terry-type search may be constitutionally executed prior to an arrest based upon probable cause. A narrower area for the search is created by the very fact that there are only certain areas from which threats to the police officer may be obtained. Therefore, although fruits of a search incident to a lawful arrest may be drawn from an area outside the immediate reach of the arrestee, a search for weapons and other dangerous instrumentalities should be limited only to those areas within the immediate control of the arrestee.

Under either treatment model, there is a scope beyond which the search is clearly improper. In the situation at bar, the stop and limited, routine traffic arrest were pursuant to the Deputy's observation of a

misdemeanor being committed in his presence. After the plain view sighting of the tire tool in a paper sack, the Deputy told both occupants of the Volkswagen to get out of the car and stand at the rear of the car. Rather than ask for a driver's license and car registration, and rather than search the occupants for weapons, both searches being within the scope of either a search incident to a lawful arrest or a protective search, the Deputy proceeded to search the paper bag on the back seat of the car even though he knew of no crime with which they might be associated. This specific search was outside the scope of both treatment models mentioned above. The search of the car was not incident to the lawful, limited routine traffic arrest because no evidence of the crime charged was inside the car. Also, in addition to the fact that the Deputy testified that he apprehended no

fear and was not worried for his safety, the occupants were outside the car, and therefore the scope of a protective search was exceeded, as there is no way, standing at the rear of the car, the occupants could have reached into the car and gained control of some instrumentality which would pose a threat to the Deputy.

> "[t]his Court has held that a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope "and" [t]he scope of the search must be strictly tied to and justified by the circumstances which rendered its initiation permissible." TERRY V. OHIO, 392 U.S. 1, 17-19, 88 S. Ct. 1868, 1878, 20 L.Ed. 2d 889 (1968).

Subsequent to Terry, in Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed. 2d 685 (1969), this Court more firmly outlined the law applicable to both searches incident to a lawful arrest and searches constituted for the protection of the arresting authority. In Chimel, where

the defendant was arrested in his home, pursuant to an arrest warrant, the arresting officers, who had no search warrant, proceeded to search the defendant's entire house. The result, reached by this Court, was that "[A]pplication of sound Fourth Amendment principles to the facts of this case produces a clear result. The search here went far beyond the petitioner's person and the area within which he might have obtained either a weapon or something that could have been used in evidence against him. There was no constitutional justification, in the absence of a search warrant, for extending the search beyond that area. The scope of the search was therefore, 'unreasonable' under the Fourth and Fourteenth Amendments... "Supra, 395 U.S. at 768, 23 L.Ed. 2d at 697.

Petitioner contends that even if Gustafson and Robinson are to be extended to cover situations where the arrest is only

for a minor traffic offense, and the customary procedure would not entail taking the misdemeanant into police custody, Chimel still remains to act as a brake on the scope of any search made either incident to the lawful arrest or for the protection of the arresting officer. Therefore, even if a search was proper in the situation at bar, the scope of that search was excessive.

The actions of Deputy Fields were in clear violation of the defendant's Fourth and Fourteenth Amendment rights when the Deputy examined the paper sack on the floor of the car. The evidence subsequently admitted at the trial was not harmless error under the decisions of Chapman v. California, (1967) 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed 2d 705, and Harrington v. California, (1969) 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed. 2d 284. Therefore, this case should be reversed.

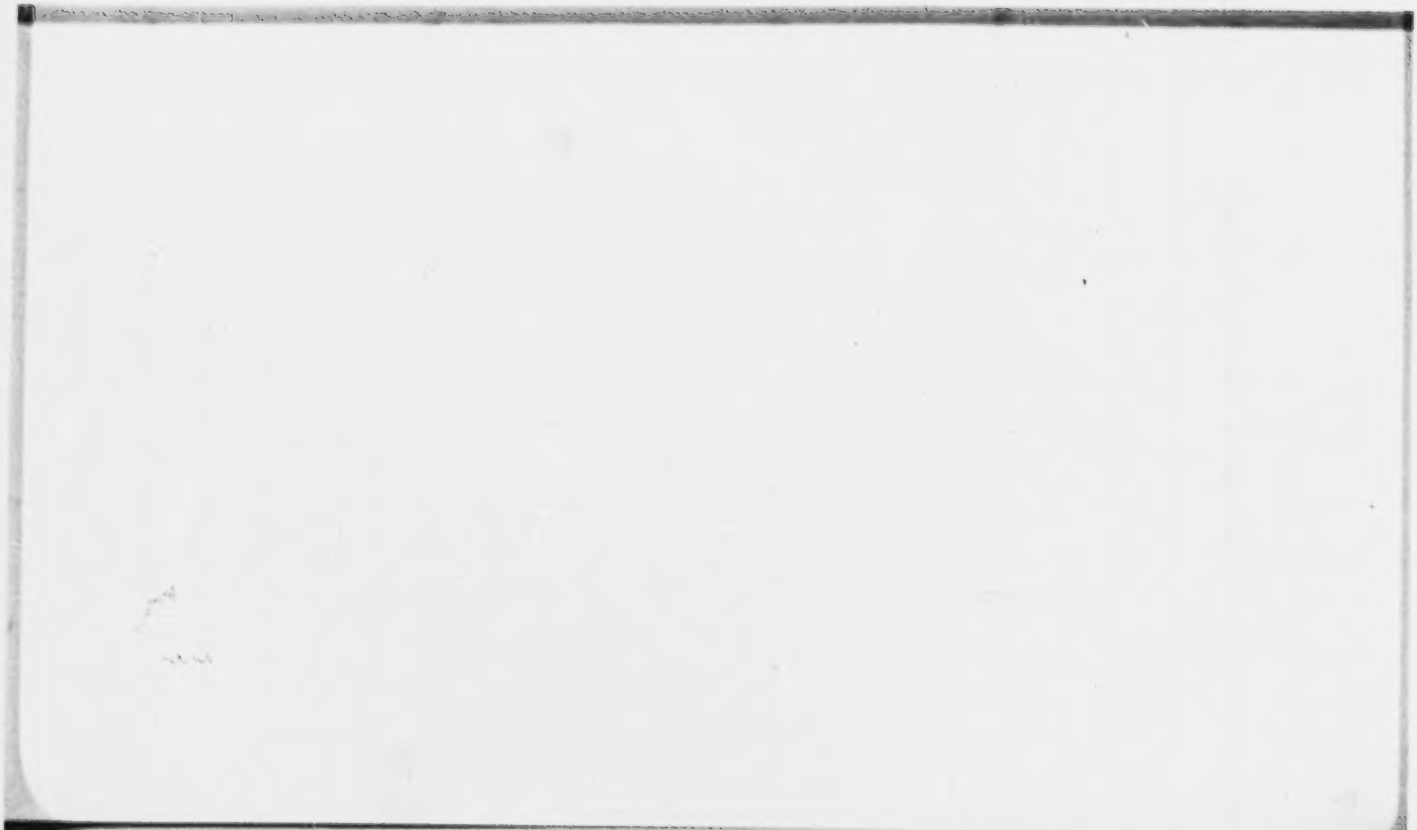
II.

At least five persons testified during the various hearings and the trial as to the identifications made by the Bosley's at the police conducted "show-up." Petitioner contends that any such identification was unduly tainted by the very nature of the show-up. The Bosley's told the officers that they either could not identify the robbers or else could not give a description. Mr. Bosley could not identify the robbers, but he did furnish a description of their clothing. Ms. Bosley, at the robbery scene, could not identify anyone, and could not give a description of the clothing, but she did say that she recognized a voice, although she could not associate that voice with a name until she had seen Petitioner at the scene of the shooting.

Regardless of the sequence of events leading up to the identification of Petitioner

as one of the robbers, there is no doubt but that the show-up was so unduly suggestive as to warrant the suppression of the Bosley's identification of Petitioner. "If the pre-trial lineup did not meet constitutional standards, then the witnesses' in-court identifications were the fruit of a forbidden procedure and should not have been used in the state's case." United States v. Wade 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed. 2d 1149 (1967).

The above conclusion from Wade reaches to the heart of Petitioner's contention. It has been held improper for the officials of the state, in this case the police, to give the witness making the identification the impression that the person they are asked to view is the suspect in the case. It is true that this is very hard to accomplish, but if the witness were merely being asked to identify



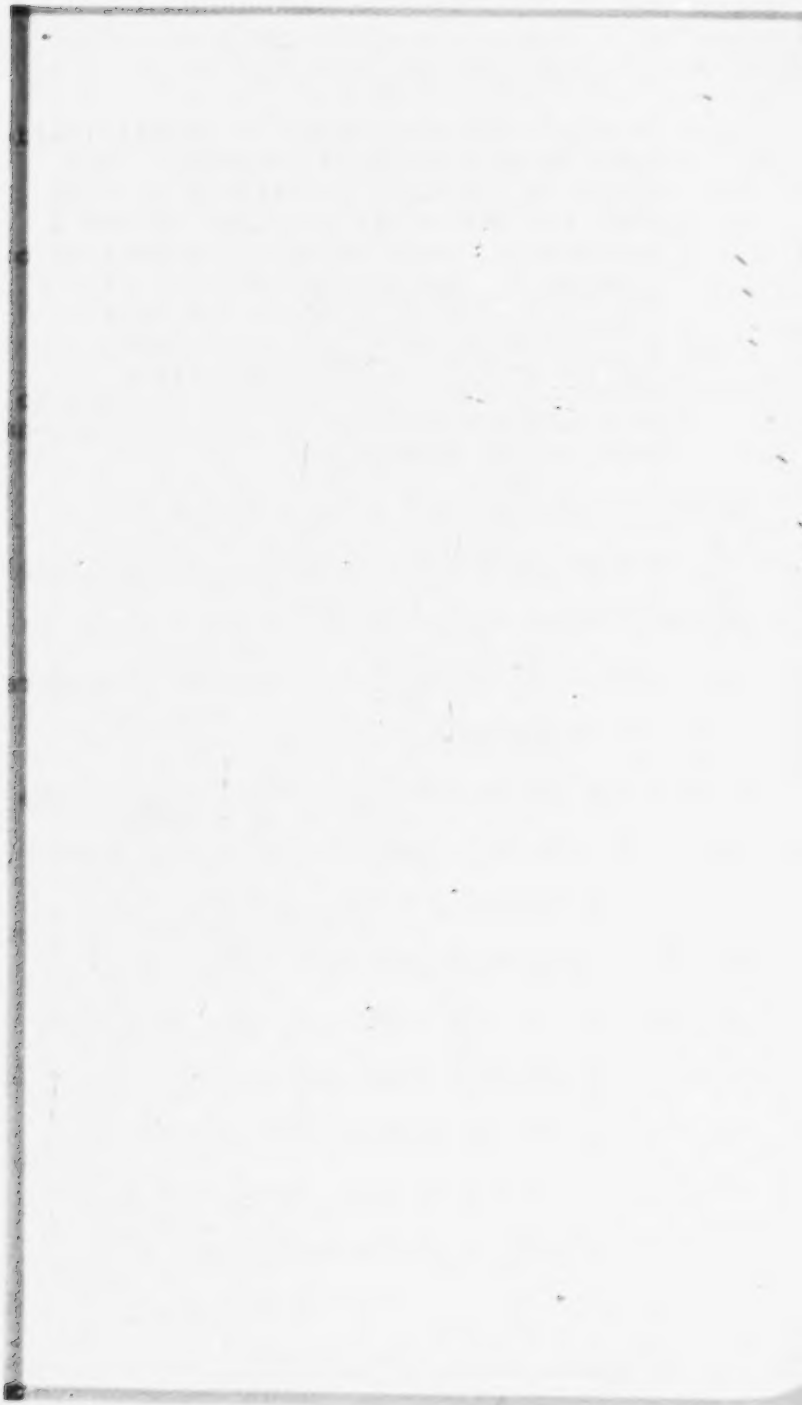
an individual who was another witness to the event in question, but exhibited hesitancy to step forward, it is certain the first witness, who is making the identification, would be apprised of the proper relationship of the parties to the event. Here, on more than one occasion, the Bosley's were told that the individuals they were looking at were indeed suspects in the robbery. The Fifth Circuit Court of Appeals has very ably capsulized the current law in this area:

> By inviting to view the suspect as he sat alone in the state attorney's office beside one or two police officers, the police in effect suggested that 'This is the man.' Foster v. California 394 U.S. 440, 443, 89 S.Ct. 1127, 22 L.Ed. 2d 402 (1969). Such singling out, or indicating to the witness that the man in custody is the man the police believe to have committed the crime, is a classic example of impermissible suggestiveness. See Crume v. Beto, 383 F2d 36, 39 (CA5 1967), cert denied, 395 U.S. 964, 89 S.Ct. 2106, 23 L.Ed. 2d 749 (1969). Consequently, the state committed constitutional error

> in eliciting testimony of identifications made at this tainted procedure, and since it has made no attempt to show that its error was harmless beyond a reasonable doubt under the teachings of Chapman v. California 386 U.S. 18, 87, S.Ct. 824 17 L.Ed.2d 705 (1967), petitioner is entitled to federal habeas relief. Should the state decide to retry petitioner, it must do so without testimony of identifications made at the show-up.

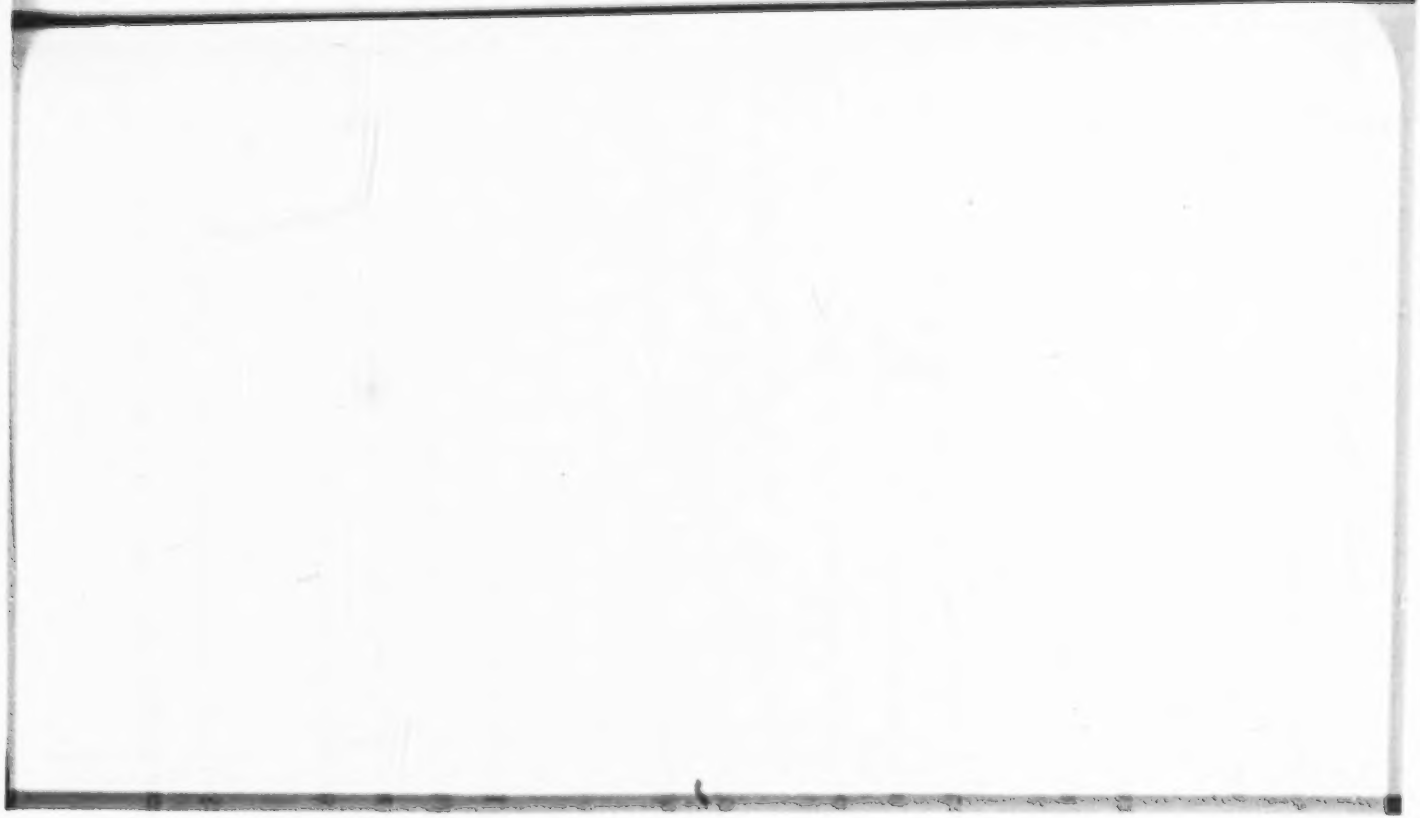
Rudd v. Florida (CA5 1973) 477 F2d 805.

Following the above model, Petitioner contends that there was indeed too much information of a suggestive nature transfered from the deputies to the Bosley's. The transcript is full of testimony wherein the deputies just tell the Bosley's that they think they have the suspects. Further, as no one had supplied more than a description of the suspects, and even upon seeing one suspect dead and the other handcuffed on his face in the immediate vicinity of the dead man, there was no positive identification except for the



testimony of Ms. Bosley, who had not been able to supply even a description until that time.

Because of the very nature of the on-the-scene identification, any testimony at trial should have been suppressed. Yet the fruit of the improper show-up was allowed into evidence. The state contended previously that there might have been sufficient independent indications that the identification was trustworthy and therefore the suggestiveness of the identification should not result in the identification being thrown out. However, the only information which tended to associate either suspect to the robbery was the fact that the blue overnight case, reported stolen during the robbery,was found in the car also. However, the overnight case had been described as having airplane stickers on it and also as having had no holes in it when the witness,



Ms. Bosley, last saw it. The blue overnight case found in the car had no such stickers on it, and was damaged much more than Ms. Bosley had ever indicated. Aside from the overnight case, there was only the illegally seized tire tool to create the aura of a robbery. There is no question but that there was not sufficient additional evidence, of a corroborative nature, to allow the identification to stand regardless of the suggestive nature of the show-up.

As there was no manner in which the suggestive show-up could be redeemed, the testimony as to that show-up should have been excluded. This is not a situation where subtlety and innuendo are employed in order to suggest that the witness should select a certain individual as the prime suspect in a crime. This is a situation where the witnesses were blatantly told that the individuals they were to view were indeed

suspects in a particular crime. Such behavior far exceeds the narrow limits established in Wade, Gilbert, Stovall v. Denno, and all subsequent cases which reflect not only on the proper procedure to employ when on-the-scene confrontations are made, but also on those procedures which are to be avoided when on-the-scene confrontations are made.

III.

As stated in the Facts section, the bailiff, James Fletcher made a statement to the jurors, evidently in response to a question posed by the jury members, which petitioner contends was not only prejudicial, but highly improper in a Constitutional sense.

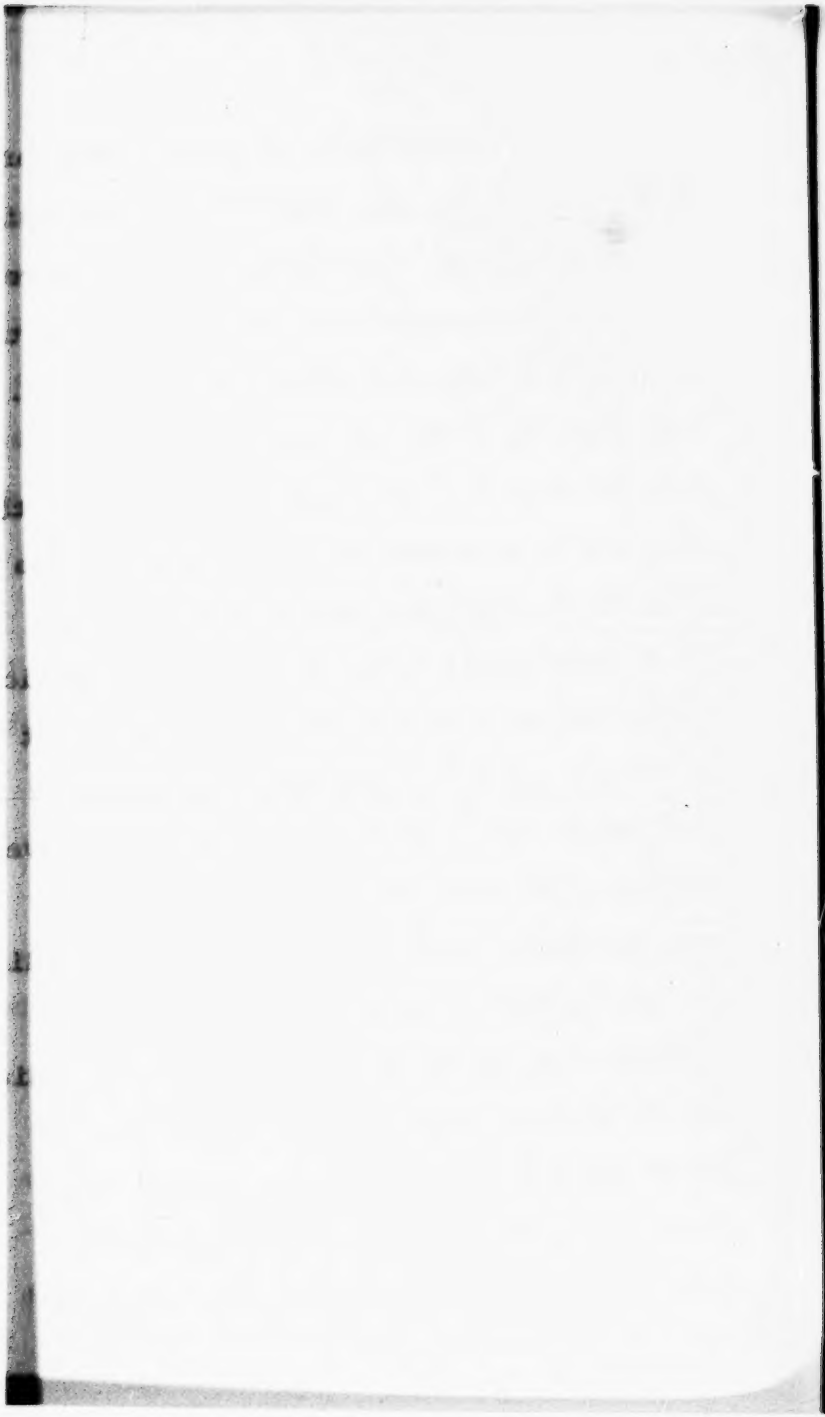
There are two approaches to this particular argument. First, petitioner contends the actions of the bailiff denied him a fair trial. Second, petitioner

believes he was denied due process by virtue of being denied that fair trial. Petitioner is not contending that any conversations between deliberating jurors and an outside party automatically result in a denial of a trial and a denial of due process. The key fact to remember in this particular situation is that the bailiff made comments to the jurors, and the content of those statements was contrary to the law in Indiana. Inasmuch as the question posed by the jurors had to do with a particular point of law, and the question was answered incorrectly, the prejudice is practically apparent.

Law in Indiana, contrary to law in the Federal Court systems, states that the jury not only renders a verdict, but upon a finding of guilty sets the penalty. The statutes under which the petitioner was being tried allowed the jury discretion in

reaching their ultimate verdict. However, it is likely the jury was of the impression that any penalty they chose would be merely a recommendation to the Judge, and then the Judge would make the final determination. With this in mind, and after having decided that the petitioner was guilty, the jury may have wished to impress the Judge with their attitude towards the penalty which they would levy, and their impression of the heinous nature of the offense. It is always possible, had the jury known that their word was final, they would have either taken more care or made further consideration before returning their verdict.

On appeal to the Supreme Court of Indiana, the State contended, and the Indiana courts agreed, that the fact that the Judge had explained the role of the jury to the members of this jury immediately after voir dire was sufficient to create



the proper impression in the members. However, if that were true, the jury would have had no need to ask the question in the first place. The fact of the asking is the best proof that the jury did not know its full and complete role, and there is no way the giving of the instruction at the beginning of the trial can militate against the fact that the jury did not realize the extent of its functions, and therefore felt compelled to ask further questions.

The proper procedure to have followed would have been for the jury to have been brought back into the courtroom, and have all parties present while the Judge asked the jurors what their question was, and then have the Judge, in open court, answer the question if indeed it could be answered. Instead, the bailiff returned to the jury and not only failed to relay the decision

of the Judge, but actually gave the jury information which was incorrect as to the law stated therein.

Much of the above information relates equally well to the second half of the argument on this particular issue. Namely, petitioner further feels he was denied due process under the Fifth and Fourteenth Amendments to the Constitution of the United States. The right to a trial is a fundamental right. As such, before the state may take any action which will justify depriving someone of that right, the state must exhibit a compelling interest. In this case, the state must either have had some compelling interest in ruling that there had been no prejudice or denial of right inherent in its actions, or else they must argue there was no denial of right in the first place. Evidently, the state is arguing that there is no denial of right.

However, the previous argument, which demonstrates that prejudice and damage may well have resulted from the actions of the bailiff, applies equally well here. Further, the only interest which the state apparently attempts to advance is the interest in avoiding multiple trials simply because the jury may have been misinformed as to the applicable law. These facts and inferences indicate the state's argument is weak under either of the possible justifications they may employ.

Finally, it is unlikely the State could successfully contend that the action of the bailiff was harmless beyond a reasonable doubt. An act which conflicts with such a fundamental right as the right to a trial can only be harmless beyond a reasonable doubt if every possibility of harm can be presented and analyzed to determine just what might have

had an effect on the parties involved. Here, the harmful act was made off the record; yet directly to the jury. There is no way the petitioner can hope to accurately demonstrate what effect the misstatement had on the jury members. It is equally true, there is no way the state can predict what occured in the jury room. Therefore, at the very least, either the jury should have been sent back to deliberate with the new--and proper-- facts in mind, or a new trial should have been ordered.

CONCLUSION

For the foregoing reasons, Petitioner, Eddie Lee Frasier, prays that a Writ of Certiorari issue to review the Judgment and Opinion of the Supreme Court of Indiana entered in these proceedings.

Respectfully submitted,

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APPENDIX "A"

EDDIE LEE FRASIER v. STATE of INDIANA

SUPREME COURT OF INDIANA

No. 873 S149

June 4, 1974

APPEAL FROM THE MARION CRIMINAL COURT

HON. JOHN B. WILSON, JR., JUDGE

SYNOPSIS: Appeal from convictions by jury of violating the 1935 Firearms Act (unlicensed possession of a gun) and of armed robbery. Frasier contended (1) that many items of evidence found in the car should have been excluded because they were the fruits of an illegal, unconstitutional search; (2) that his identification by the robbery victims at the scene of the shooting violated due process of law in that the circumstances were overly suggestive; (3) that many items of evidence admitted either did not have a proper foundation or a sufficient chain of custody; (4) that a photograph of his dead alleged accomplice and the narration of the shooting incident by the Deputy Sheriff should not have been admitted as evidence because they were irrelevant to the crimes charged; (5) that his identity as one of the robbers was not sufficiently established; (6) that the trial judge abused his discretion in allowing the State to reopen its case-in-chief in order to prove the age of appellant; (7) that the bailiff conducted an improper conversation with the jury; (8) that the "Handbook

for Indiana Jurors" distributed to the jury contained material prejudicial to his Fifth Amendment rights; and (9) that the court erred in giving an instruction on flight.

The Supreme Court of Indiana, Arterburn, C.J., reversed in part. DeBruler, J., dissented with opinion. Prentice, J., concurs in result. ". . . police officers effecting a valid custodial arrest for a traffic offense may thoroughly search the arrestee even absent the need to disarm or the need to seize evidentiary items which had been the justifications previously used for searches incident to valid arrests." "A Deputy Sheriff may arrest any person violating any law of this State in his presence. . . . Acting within this authority, the Deputy asked for identification. Since he had the right to make an arrest [for an inadequate muffler] and a search incident thereto, he had the right to make the considerably lesser intrusion of a request for identification. The ensuing assault on the Deputy validates the subsequent search of the car and the seizure of the items therein. [Citations omitted.]" ". . . the totality of the relevant circumstances does not indicate a 'substantial likelihood of misidentification.'" Appellant did not assert that he was prejudiced by the admission of the items. The photograph and the relation of the shooting incident were part of the res gestae. The victims of the robbery made positive in-court identifications of the appellant. The appellant did not indicate why the reopening of the State's case-in-chief was an abuse of discretion. "The important point is not who offers an explanation but that this Court be satisfied that 'no harm or prejudice resulted' from the misconduct of the bailiff." The Handbook did not create an implication that the defendant had a duty to testify and the judge admonished the jury on that point. "An instruction on a certain theory in a case is proper if within the issues and there is any evidence to support it. [Citation omitted.]"

DeBruler, J., was of the opinion that "this view [the majority opinion] is a dangerous misinterpretation of *Robinson* and *Gustafson* and creates a precedent which erroneously and unwisely expands the authority of the police to search motorists on Indiana highways."

SEARCHES AND SEIZURES—Custodial Arrest for Traffic Offense. ". . . police officers effecting a valid custodial arrest for a traffic offense may thoroughly search the arrestee even absent the need to disarm or the need to seize evidentiary items which had been the justifications previously used for searches incident to valid arrests." p. 170.

SEARCHES AND SEIZURES—Search Incident to Arrest. "A Deputy Sheriff may arrest any person violating any law of this State in his presence. . . . Acting within this authority, the Deputy asked for identification. Since he had the right to make an arrest [for an inadequate muffler] and a search incident thereto, he had the right to make the considerably lesser intrusion of a request for identification. The ensuing assault on the Deputy validates the subsequent search of the car and the seizure of the items therein. [Citations omitted.]" pp. 170, 171.

APPEARANCES: Richard Milan, Indianapolis, Indiana, for Appellant.

Theodore L. Sendak, Attorney General of Indiana, Glenn A. Grampp, Deputy Attorney General, for Appellee.

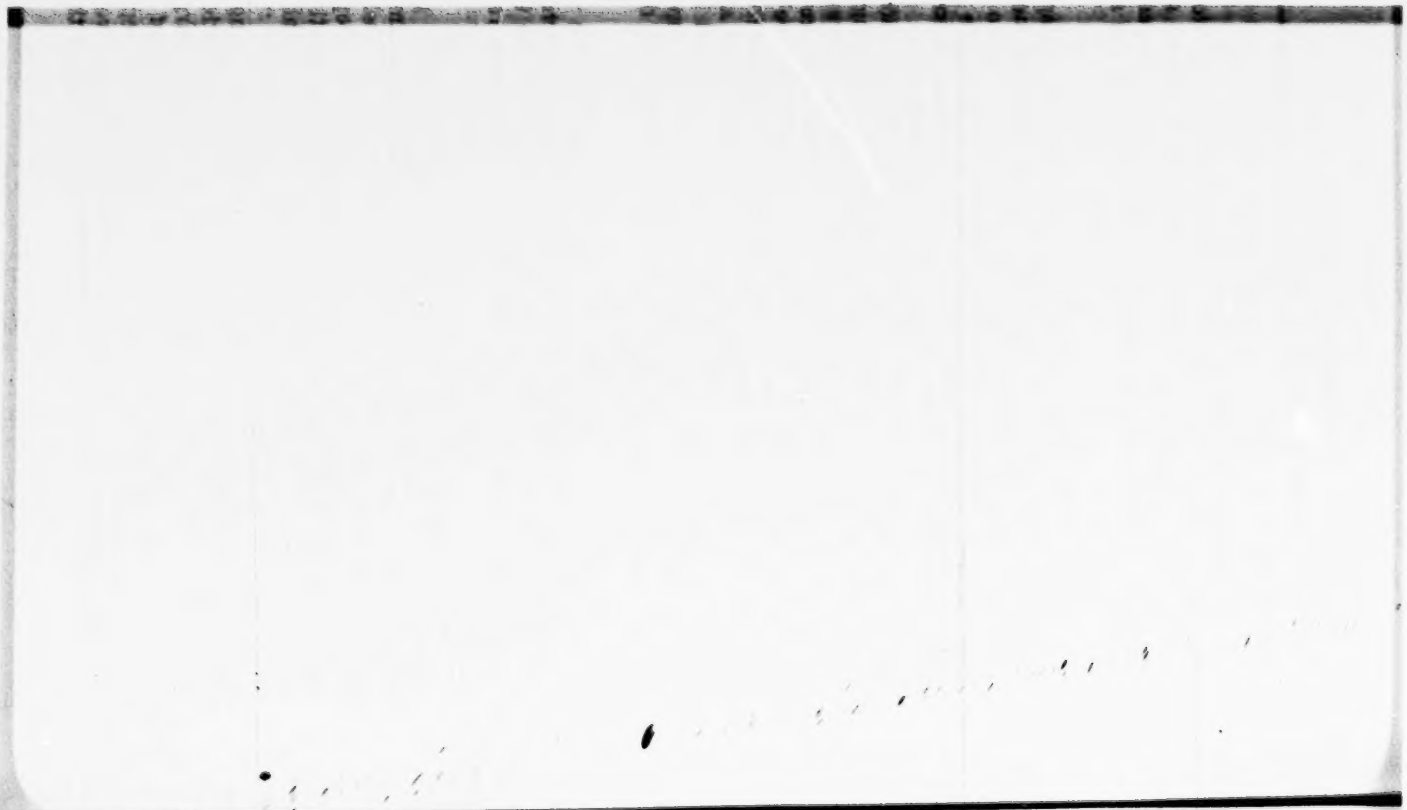
ARTERBURN, C.J.

On January 30, 1973, a jury convicted appellant of violating the 1935 Firearms Act (unlicensed possession of a gun) and of armed robbery. Appellant was sentenced to ten (10) years on the gun-possession charge and thirty (30) years on the armed robbery charge.

Appellant has raised numerous issues. Some of his specifications of error relate to the armed robbery charge alone, and some to the gun-possession charge, and some refer to the overall conduct of the trial itself. We reverse the trial court's judgment on the gun-possession charge. The evidence, from the viewpoint most favorable to the State, *Blackburn v. State* (1973), —— Ind. —— [34 Ind.Dec. 684], 291 N.E.2d 686, and cases cited therein, is simply that appellant was a passenger in an automobile stopped by a Deputy Sheriff. Both the driver and appellant, who was riding in the front passenger seat, got out of the car and stood at the rear of the car. A gunfight developed between the driver and the Deputy Sheriff. Subsequent to this gunfight, in which the driver of the car was killed, the appellant was arrested. A search of the car revealed a pistol lying on the passenger's seat. These meager facts do not support, as a matter of law, an inference that beyond a reasonable doubt appellant once possessed this gun.

We affirm the conviction for armed robbery. We next consider those specifications of error which relate to that charge as well as those which involve the general conduct of the trial. The following additional facts are relevant to the issues raised by appellant.

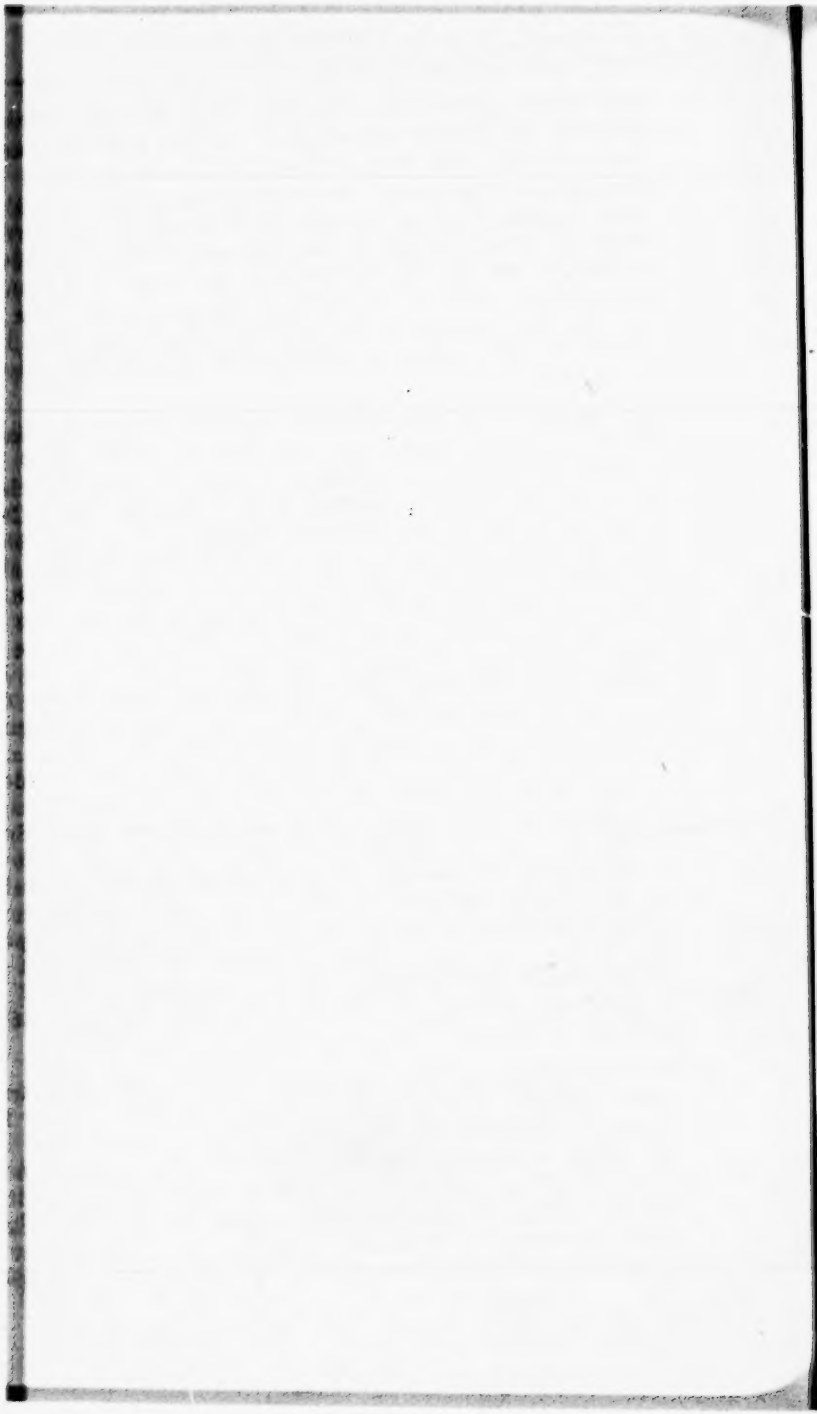
On the night of August 28, 1972, two men with guns robbed Mr. and Mrs. Larry Bosley in the Bosley's apartment. Moments after the robbery and in the vicinity of the Bosley's apartment, which was an area of frequent burglaries, Deputy Sheriff Fields, without knowledge of the robbery, routinely stopped a Volkswagen with a noisy muffler. Using a flashlight to glance inside the car, the Deputy saw in plain view a "tire tool or pry bar protruding from a brown paper sack" lying on the floorboard between the two seats. The Deputy's experience suggested to him that such an object was a frequent burglar tool. At the command of the Deputy, the two occupants of the car got out and stood at either rear side of the car. The Deputy then reached down and opened the paper sack. He discovered that the object was a tire tool and that the sack contained three



pink rubber gloves and a hunting knife. His suspicions further aroused, the Deputy approached the two men and asked for identification. The driver drew an automatic pistol and the Deputy heard the pistol "click." The Deputy shot and killed this man. Appellant ran to the right front of the car but surrendered when the Deputy fired at him through the rear window. Subsequently, the car was searched at the scene and many items seized which were introduced as evidence at trial. The robbery victims were brought to the scene and there identified both the dead man and appellant as the two men who had minutes earlier robbed them.

Appellant believes that the many items of evidence found in the car should have been excluded from the trial because they were the fruits of an illegal, unconstitutional search. *Mapp v. Ohio* (1961), 367 U.S. 643, 6 L.Ed.2d 1081, 81 S.Ct. 1684. Appellant's reasoning is that the Deputy had no probable cause to look into the paper sack and that the ensuing shootout and search of the car were caused by this original search. Thus, runs appellant's argument, the tainted fruits of that search must be excluded. We do not decide this point for the reason that we decide this issue pursuant to *Gustafson v. Florida* (1973), 42 L.W. 4068 [94 S.Ct. 488], 38 L.Ed.2d 456. *Gustafson, supra,* held that police officers effecting a valid custodial arrest for a traffic offense may thoroughly search the arrestee even absent the need to disarm or the need to seize evidentiary items which had been the justifications previously used for searches incident to valid arrests. As the United States Supreme Court said in the companion case to *Gustafson, supra:* "It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." *United States v. Robinson* (1973), 42 L.W. 4055 at 4060 [94 S.Ct. 467], 38 L.Ed.2d 427 at 441.

In Indiana an inadequate muffler is a misdemeanor. IC 1971, 9-8-6-36 (Burns' Ind.Stat.Ann. § 47-2230 (Code Ed.)). A Deputy Sheriff may arrest any person violating any law of this State in his presence. IC 1971, 35-1-21-1 (Burns' Ind.Stat. Ann. § 9-1024 (1956 Repl.)). Acting within this authority, the Deputy asked for identification. Since he had the right to make an arrest and a search incident thereto, he had the right to make the considerably lesser intrusion of a request for



identification. The ensuing assault on the Deputy validates the subsequent search of the car and seizure of the items therein. *Chambers v. Maroney* (1970), 399 U.S. 42, 26 L.Ed.2d 419, 90 S.Ct. 1975; *Brannon, Burton v. State* (1957), 236 Ind. 680, 142 N.E.2d 215; *Sisk v. State* (1953), 232 Ind. 214, 110 N.E.2d 627.

Appellant claims that his identification by the robbery victims at the scene of the shooting violated due process of law in that the circumstances were overly suggestive. *Stovall v. Denno* (1967), 388 U.S. 293, 18 L.Ed.2d 1199, 87 S.Ct. 1967. The inquiry, as formulated by the United States Supreme Court, is "whether . . . the confrontation was so unnecessarily suggestive and conducive to irreparable mistaken identification that (the defendant) was denied due process of law." *Stovall, supra*, 388 U.S. at 302. Our confrontation cases (*Sawyer v. State* (1973), —— Ind. —— [37 Ind.Dec. 405], 298 N.E.2d 440 (photographs); *Wright v. State* (1972), —— Ind. —— [32 Ind.Dec. 151], 285 N.E.2d 650; *Dillard v. State* (1971), 257 Ind. 282 [27 Ind.Dec. 346], 274 N.E.2d 387), have crystallized the duty of the reviewing court to the basic inquiry of whether or not the witness was, in fact, influenced by the totality of the circumstances in a manner which indicates a "very substantial likelihood of misidentification." *Sawyer, supra*, 298 N.E.2d at 443 [37 Ind.Dec. at 408]. Under the particular circumstances of this case, appellant is able to isolate numerous circumstances which suggest what Justice Hunter recognized as the inherent suggestiveness of "any one-on-one confrontation." *Wright, supra*, 285 N.E.2d at 653 [32 Ind. Dec. at 155]. But in the case before us these circumstances are outweighed by the fact that the victims knew appellant prior to the robbery. Additionally, witness Larry Bosley, one of the robbery victims, testified that his on-the-scene identification was not based on anything the police said to him that night. We think the totality of the relevant circumstances does not indicate a "substantial likelihood of misidentification."

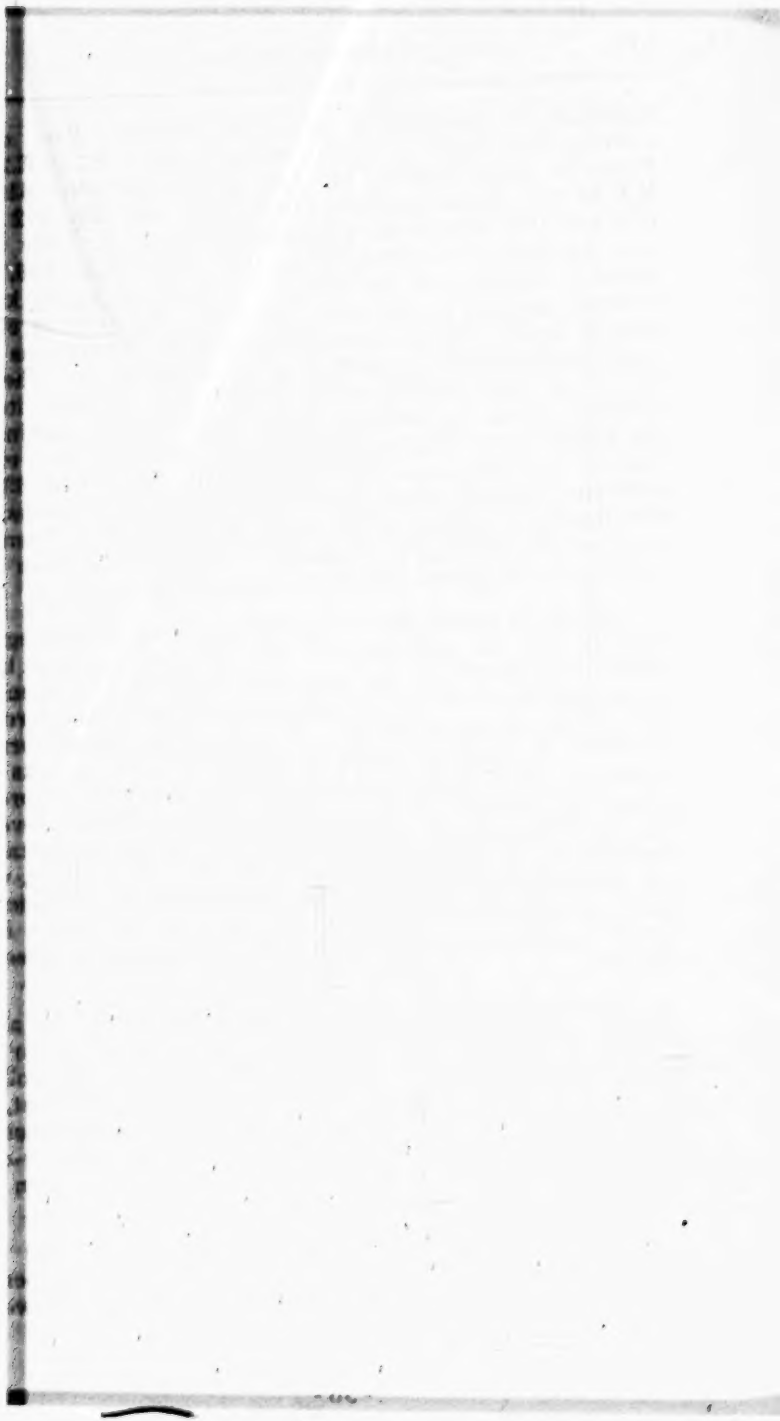
Appellant makes an objection to the admission into evidence of each of sixteen (16) different items of evidence. The grounds for objection in each instance are that either a proper foundation or a sufficient chain of custody had not been established for any of the sixteen (16) items. Appellant does not, relative to each item, specify in what way the foundation laid or the chain of custody shown was inadequate. Consequently, we can only say that in our opinion each item was sufficiently connected to

appellant to constitute a proper foundation. *Rose v. State* (1972), —— Ind. —— [30 Ind.Dec. 422], 281 N.E.2d 486; *Dixon v. State* (1963), 243 Ind. 654 [1 Ind.Dec. 318], 189 N.E.2d 715; *Smith v. State* (1961), 241 Ind. 598, 172 N.E.2d 673, and that within the guidelines of *Bonds v. State* (1973), —— Ind.App. ——, [39 Ind.Dec. 634], 303 N.E.2d 686, proper chain of custody was established for the nonfungible kinds of evidence involved in this case. Moreover, the items of evidence here at issue were all cumulative evidence. There was an in-court identification of appellant as the armed robber. Therefore, any error, with respect to the admissibility of these items of evidence would be harmless since appellant in showing how the alleged error was prejudicial to his cause, *Turner v. State* (1972), —— Ind. —— [32 Ind.Dec. 605], 287 N.E.2d 339, and cases cited therein, merely asserted that some of the items "were specifically introduced by the State of Indiana to influence the jury and to prejudice the defendant" which is not even an assertion that defendant was in fact prejudiced.

Appellant asserts that a photograph of his dead alleged accomplice and the narration of that shooting incident by the Deputy Sheriff should not have been admitted as evidence because they are irrelevant to the crimes charged, armed robbery and unlicensed possession of a firearm. The proper form for this kind of objection would be that the evidence lacks "materiality." That is, it does not tend to prove or disprove a proposition in issue. 12 I.L.E. *Evidence* § 41 (1959). Nevertheless, the evidence here in dispute was part of the res gestae and was material for the reason that it tended to show flight, which is a circumstance relevant to the commission of a crime, and tended to show reasons for possession of a gun, which is obviously a necessary element of a charge of unlawful possession of a gun.

Appellant suggests that his identity as one of the armed robbers was not sufficiently established since a minor discrepancy existed between the description given by the robbery victims to a sheriff's deputy who came to their apartment, and the clothing worn by the appellant when he was apprehended. However, the decisive fact is that both victims made *in-court* positive identification of appellant as one of the two men who robbed them on the night in question.

Another contention made by appellant is that the trial judge abused his discretion in allowing the State to reopen its case-in-chief in order to prove the age of appellant. However,



since appellant totally fails to indicate why the reopening was an abuse of discretion we have no showing that appellant was prejudiced by the court's decision.

Appellant's attorney has submitted an affidavit that through an undescribed source appellant's attorney learned during the deliberation of the jury that the bailiff had had an improper conversation with the jury. Specifically, it is alleged that a juror asked whether sentences would run consecutively or concurrently. The bailiff said he would speak to the judge. He did, and the judge instructed him to tell the jury that the question could not be answered. Instead, the bailiff told the jury that the sentencing of the defendant was up to the judge. The State has not replied to this contention, either by submitting counter-affidavits or by argument. The rule for situations of this kind is as follows:

> "When an irregularity such as this occurs harm will be presumed, and if the irregularity is not explained, a reversal of the judgment should follow. However, if an explanation for the alleged misconduct is offered, and if this Court is satisfied that no harm or prejudice resulted, then the judgment of the trial court will not be disturbed."

Conrad v. Tomlinson (1972), —— Ind. —— [29 Ind.Dec. 539 at 545-6], 279 N.E.2d 546 at 551. The important point is not who offers an explanation but that this Court be satisfied that "no harm or prejudice resulted" from the misconduct of the bailiff. In the case at bar, appellant suggests that the bailiff's improper remark could have influenced undecided jurors to vote guilty in the belief that the judge would mitigate such a vote by light concurrent sentences. However, jurors had before them the possible verdict forms. The verdict forms reveal on their face the punishment to be inflicted. Moreover, the trial judge told the voir dire panel that "the amount of penalty is to be set by the jury in it's (sic) verdict." Therefore, we are convinced that the jury was not misled in their deliberations.

Another allegation of error by appellant is that an Indiana State Bar Association publication entitled "Handbook for Indiana Jurors" which was distributed to the panel contained material prejudicial to appellant's Fifth Amendment rights. The material complained of was the following descriptive passage:

> "The court room trial events are substantially the same in both civil and criminal cases. In all criminal cases the plaintiff is the State of Indiana and the plaintiff's lawyer

is the Prosecuting Attorney or a Deputy Prosecuting Attorney . . .

6. Defendant's Evidence

A. Witnesses for Defendant

(1) Direct examination by defendant's lawyer.

(2) Cross-examination by plaintiff's lawyer.

(3) Re-direct examination by defendant's lawyer.

B. Exhibits for Defendant (These may be submitted during the questioning of witnesses).

7. Defendant Rests

8. Plaintiff's Rebuttal Evidence

(Same as Number 4 above, except that this evidence is confined to answering the defendant's evidence.)"

Appellant's argument is that this passage creates an implication that a defendant has a duty to testify. We see no such implication available to men of ordinary ways of thinking and reasoning. Furthermore, we think any possible misunderstanding would have been cured by the trial judge's admonishment, in response to appellant's complaint about the Handbook, to the jury that "the Defendant is not required to testify by law and constitution, and if he does not, this should not be considered or commented upon by the jury."

Appellant's final specifications of error relate to instructions. Appellant believes that the evidence did not warrant the following instruction:

> "The flight or attempt to escape by a person immediately after the commission of the crime with which he is charged, if there was such a flight, is a circumstance to be considered by you in connection with all the other evidence to aid you in determining the question of his guilt or innocence."

Defendant's argument is that what appeared to be flight—running, when the shooting occurred, from the back of the car to the front—was merely a reaction of fear and apprehension for one's own safety. Such an interpretation is for the jury. An instruction on a certain theory in a case is proper if within the issues and there is any evidence to support it. *Moore v.*

Funk (1973), —— Ind.App. —— [35 Ind.Dec. 532], 293 N.E.2d 534. A court in determining whether an instruction is applicable to the evidence must consider all reasonable inferences which might be drawn from the evidence. *John Hancock Mut. Life Ins. Co. v. Gordon* (1941), 109 Ind.App. 58, 32 N.E.2d 727.

Appellant asserts that those instructions (22A, 22B) which encompassed the multiplicity of possible verdicts were "long and cumbersome; they are unclear and relatively impossible to understand." These assertions, offered without specific examples or elucidation, are too general and too vague to be of consequence. We cannot fathom the significance of an instruction being "relatively impossible to understand." The jury either understood or it did not. We have been offered no reason by appellant to think that the jury did not understand.

In his "Motion to Correct Errors" appellant preserved an objection to a certain instruction. Then, in his brief appellant did not discuss the issue preserved by his motion to correct errors. However, in his reply-brief appellant attempted to discuss the issue for the first time but the instruction and the objection thereto were not quoted. Rule AP. 8.3(A) provides that:

> "When error is predicated on the giving or refusing of any instruction, the instruction shall be set out verbatim in the argument section of the brief with the verbatim objections, if any, made thereto. Any error alleged in the motion to correct errors not treated as herein directed shall be deemed waived."

Appellant has thus twice failed to follow these requirements and therefore the alleged error is deemed waived.

As hereinbefore explained, the judgment of the trial court is reversed as to Count I, Violation of the 1935 Firearms Act, and affirmed as to Count II, Armed Robbery.

Givan, and Hunter, JJ., concur.

Prentice, J., concurs in result.

DeBruler, J., dissents with opinion.

DISSENTING OPINION

DEBRULER, J.

The majority opinion sanctions the initial search of the paper sack seen on the floor of the car with the theory that it

was a search incident to a lawful arrest and therefore is not violative of the Fourth Amendment under the United States Supreme Court decisions in *United States v. Robinson* (1973), 94 S.Ct. 467, and *Gustafson v. Fla.* (1973), 94 S.Ct. 488. I believe this view is a dangerous misinterpretation of *Robinson* and *Gustafson* and creates a precedent which erroneously and unwisely expands the authority of the police to search motorists on Indiana highways.

When Deputy Sheriff Fields first stopped this automobile he had no knowledge of the recent armed robbery at the Bosley's home. His only authority to stop the car at that time was for a misdemeanor violation of one of the sections of the Motor Vehicle Code which concerns the operation and maintenance of certain automotive equipment. When he saw part of a tire tool protruding from a paper sack lying on the floor of the automobile he ordered the occupants out of the car, opened the sack and discovered a tire tool, pink rubber gloves and a hunting knife. All three of these exhibits, along with numerous others discovered after the shooting incident, were admitted at trial. Clearly the opening of the paper sack on the floor of the car constituted a search within the meaning of the Fourth Amendment. *Chambers v. Maroney* (1970), 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419; *Carroll v. United States* (1925), 267 U.S. 132, 45 S.Ct. 280 [69 L.Ed. 543]. The majority today finds, however, that although Deputy Fields had no probable cause at the time of the search of the sack, it was nevertheless proper solely on the ground that the defendant and his companion had been "arrested" on the loud muffler charge and that the *Robinson* and *Gustafson* decisions allow a police officer to "thoroughly search the arrestee" in this situation as a search incident to a lawful arrest. This holding misinterprets those decisions in two significant ways. First, *Gustafson* and *Robinson* concern the permissible scope of a search of a person incident to a custodial arrest, but they do not authorize, as the majority holding would seem to imply, a search of those sections of a car which lie beyond the area of control of the arrestee. Secondly, neither decision concerns the type of "arrest" with which we are confronted here.

On those occasions when a police officer in Indiana stops a motorist for a minor traffic violation, as we have here, the officer is not empowered to automatically effect a full custodial arrest and haul the motorist off to the stationhouse. Both IC 1971, 9-4-1-130, being Burns' § 47-2307 and IC 1971, 9-4-1-

131, being Burns' § 47-2308, require that the officer may only issue a summons to the offender and then must allow him to proceed on his way. It is only in the case of a serious traffic offense (Burns' § 47-2307(2) to (5)), or in the event a motorist refuses to promise to appear in court at a future date (Burns' § 47-2307(6)) that the police may effect a full arrest and take the motorist to the police station for booking. In a normal traffic misdemeanor situation a police officer may only impose what may be termed a limited arrest for the purpose of issuing the summons and then must release the motorist from this limited form of custody.

Both the facts and language of *Gustafson* and *Robinson* specifically concern the type of traffic violations which requires or allows an officer to effect a full custodial arrest. It is apparent from the opinions that the sole basis for the full scale search of the motorist was the full custodial type of arrest being effected in both of those situations.

> "The justification or reason for the authority to search incident to a lawful arrest rests quite as much on the need to disarm the suspect *in order to take him into custody* as it does on the need to preserve evidence on his person for later use at trial.
>
> . . .
>
> It is scarcely open to doubt that the danger to an officer is far greater in the case of the extended exposure which follows *the taking of a suspect into custody and transporting him to the police station* than in the case of the relatively fleeting contact resulting from the typical *Terry* type stop. This is an adequate basis for treating all custodial arrests alike for purposes of search justification." (Emphasis added.) *United States v. Robinson* (1973), 94 S.Ct. at 476.

In a footnote in *Robinson* the Court made a sharp distinction between the full custodial arrest with which it was concerned in that case, and what was characterized by the Court as a "routine traffic stop, *i.e.*, where the officer would simply issue a notice of violation and allow the offender to proceed." Fn. 6 at 477. The majority specifically stated that they were not deciding the constitutionality of searches incident to these routine traffic stops. It is precisely that type of limited arrest resulting from a routine traffic stop which faces us here, and while the Fourth Amendment does not prevent a

full search incident to a lawful custodial arrest I do not believe it to condone a full search incident to a routine traffic stop where the police officer is not authorized to take the motorist into custody. It is evident that the Supreme Court justifies the search of the arrestee on the grounds of the full custodial nature of the arrest, but where, as here, there is no full custodial arrest the justification and rationale allowing the search is obviously absent.

The majority's present interpretation of the *Gustafson* and *Robinson* decisions, as allowing a full scale search of anyone who violates some traffic regulation, invites wholesale and groundless intrusions upon the personal privacy of thousands of Indiana motorists. Thus, under this interpretation the vast number of Indiana citizens who travel by automobile and who may be stopped for having a nonfunctioning license plate light (IC 1971, 9-8-6-6, being Burns' § 47-2204), or for failure to dim their headlights for an oncoming car (IC 1971, 9-8-6-24, being Burns' § 47-2220), or for driving on studded snow tires after the first of May (IC 1971, 9-8-6-39, being Burns' § 47-2233), or for any of a multitude of minor traffic offenses, are subject, without further authorization or circumstances, to having the contents of their wallets, pockets and pants cuffs examined by the police.

I am not, of course, claiming that an officer can never conduct a search after a routine traffic stop. We have repeatedly recognized the essential concerns of a police officer for his own safety when he encounters any citizen in the performance of his duty, and where there exists special facts or circumstances which gives the officer reasonable grounds to believe that the occupants of a car are armed, he may conduct a protective frisk. *Terry v. Ohio* (1967), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889; *Sayne v. State* (1972), —— Ind. —— [29 Ind.Dec. 196], 279 N.E.2d 196; *Paxton v. State* (1970), 255 Ind. 264 [23 Ind.Dec. 483], 263 N.E.2d 636. The majority opinion, however, does not attempt to base its holding on the *Terry* exception, but makes, what is in my opinion, the mistake of authorizing full scale searches based on the sole fact of a minor traffic violation.

Since I believe Deputy Fields was in violation of the strictures of the Fourth Amendment when he examined the paper sack on the floor of the car and because I do not think the admission of the pink gloves into evidence was harmless error under the rules of *Chapman v. California* (1967), 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 and *Harrington v. California*

(1969), 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284, I find I must dissent.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-523

EDDIE LEE FRAISER,
Petitioner,

-vs-

STATE OF INDIANA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ON BRIEF

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IN THE
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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

Whether a police officer, who arrests a motorist for a motor vehicle violation for which the motorist has the privilege of immediate release upon a promise to appear, has the right to conduct a search incident to that arrest and whether a passenger riding with such a motorist has standing to challenge a search

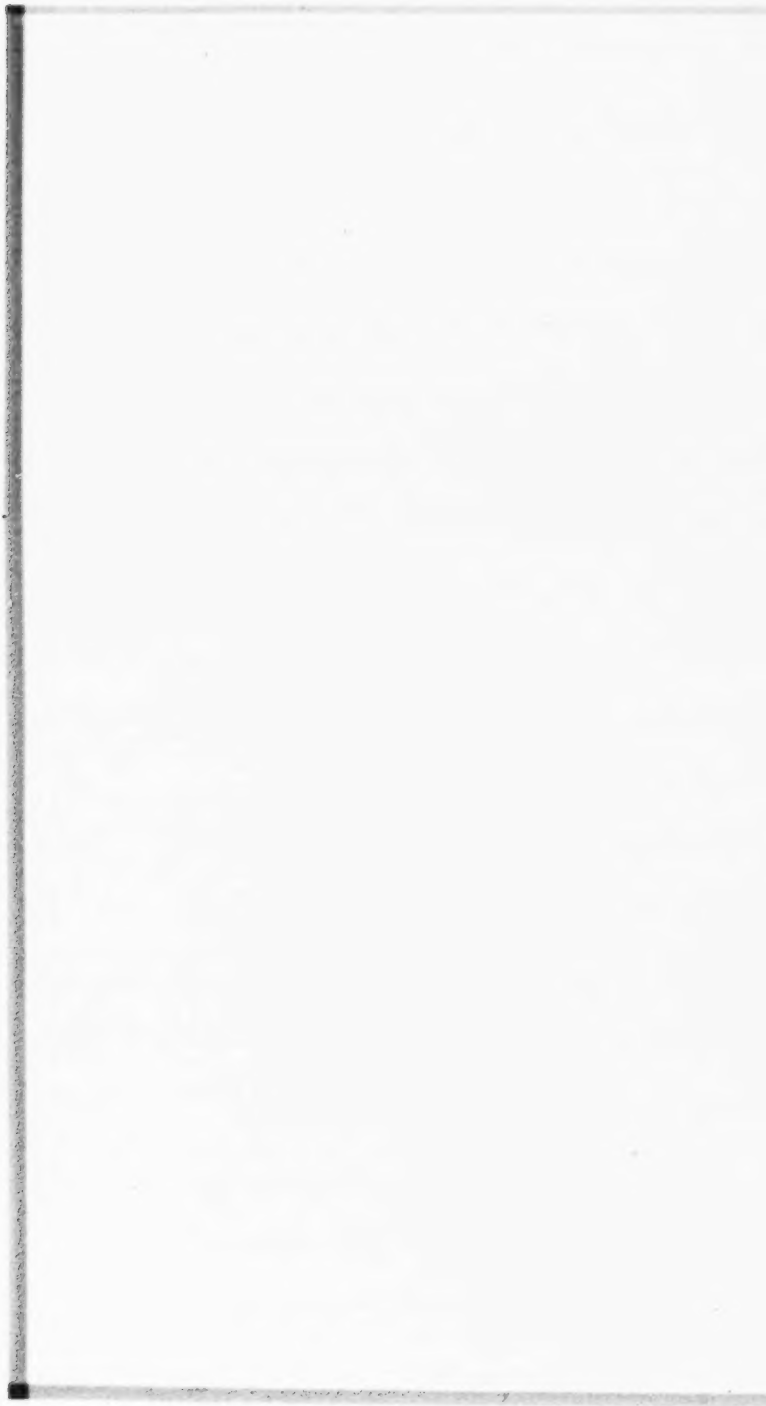
of the vehicle incident to the motorist's arrest.

Whether a confrontation between a suspect and his supposed victims on the scene of the suspect's apprehension, soon after the crime, is impermissibly suggestive because it focuses the victims' attention upon the suspect.

Whether a statement of a non-evidentiary nature by a bailiff to a jury denies a defendant a fair trial by an impartial jury.

SUMMARY OF THE ARGUMENT

The petitioner does not have standing to challenge the search of the vehicle, in which he was riding, incident to the arrest of the driver. There is no privilege of release on promise to appear in court on a charge



of improper equipment, namely a defective muffler. It is proper to search a vehicle incident to an arrest if a suspect could seize a weapon or destroy evidence in the vehicle. Even if there were a privilege of release, the search incident to the arrest would have been reasonable since it would have been necessary to take custody of the driver temporarily. If the petition were successful, the only items that would be suppressed would have been harmless.

The on-the-scene confrontation between the petitioner and his victims was not impermissibly suggestive. The exigencies of the circumstances justified the procedure,

and the comments of the police officers did not bias the procedure.

The bailiff's statement to the jury was nonevidentiary in nature. There is no evidence that the statement prejudiced the jury's deliberations or influenced the decision regarding guilt. The bailiff's mistake did not deny the petitioner a fair trial.

ARGUMENT

I.

THE SEARCH INCIDENT TO THE ARREST WAS PROPER

The first contention of the petitioner (hereinafter "defendant") is that the search of the automobile in which the defendant was riding was not justifiable as a search incident to a lawful arrest because the arrest

was for a motor vehicle violation for which a "full custodial arrest" was not possible and because a search of the vehicle would not have been justified even if the search incident to the arrest were proper. (Petition for Writ of Cert., pp.18-36.)

Note initially that the defendant has no standing to raise the issue. He was not the one arrested at the time of the stop. Nor is there any suggestion in the record that he owned or was in possession of the automobile. Brown v. United States, 411 U.S. 223, 229, 93 S.Ct. 1565, 1569, 36 L.Ed.2d 208 (1973); United States v. Sullivan, 488 F.2d 138 (5th Cir. 1973).

Nevertheless, granting arguendo

that the defendant's characterization is correct that he was the victim of an improper search incident to an arrest, his contention still must fail.

It is proper to search an automobile incident to an arrest if it appears that a suspect may have access to weapons or to evidence within the automobile. Coolidge v. New Hampshire, 403 U.S. 443, 461 n.18, 91 S.Ct. 2022, 2035 n.18, 29 L.Ed.2d 564 (1971). In point of fact, when the arresting officer first looked into the automobile he observed a tire tool, protruding from a sack. (Tr.pp.238,39.) A tire tool could have been a weapon which posed serious threat to the officer. As

a matter of law, whether he perceived a threat is immaterial, since the Court has stated that it will not play the game of analyzing an officer's subjective intent.

> The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based upon probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, no further justification is needed. United States v. Robinson, 414 U.S. 218. 94 S.Ct. 467, 477,38 L.Ed.2d 427 (1973); see also Gustafson v. Florida, 414 U.S. 260, 94 S.Ct. 488, 491, 38 L.Ed.2d 456 (1973).

The defendant contends that a search incident to an arrest is impossible if the arrest is not a

"full custodial arrest" and indicates his belief that a "full custodial arrest" is one in which a police officer can "haul a motorist off to the stationhouse." (Petition for Writ of Cert., p.24.)

The automobile in which the defendant was riding was stopped because its defective muffler constituted a violation of Burns Ind.Stat.Ann. IC 9-8-6-36 (1973 Cd.ed.) (mufflers, prevention of noise). That violation is a misdemeanor, Burns Ind.Stat.Ann. IC 9-8-6-4 (1973 Cd.3d.) (violation-penalty), for which the violator is subject to arrest by any law enforcement officer witnessing the violation. IC 35-1-21-1, Burns Ind.Stat.Ann. §9-1024 (1956 Repl.) (peace officers—

power to arrest). The defendant contends that a full custodial arrest could not have been effected for that violation because of Burns Ind. Stat.Ann. IC 9-4-1-131(a) and (d) (1973 Cd.ed.), which provide:

> (a) Whenever a person who is a resident of this state is arrested for any violation of this act (9-4-1-1—9-4-1-138) punishable as a misdeameanor, and such person is not immediately taken before a magistrate as hereinbefore provided, the arresting officer shall prepare in duplicate written notice to appear in court containing the name and address of such person, the license number of his vehicle, if any, the offense charged, and the time when and the place where such person shall appear in court.
>
> . . .
>
> (d) The arrested person in order to secure release, as provided in this section, must give his written promise so to appear in court by signing in duplicate the written notice prepared by

> the arresting officer. The original of said notice shall be retained by said officer and the copy thereof delivered to the person arrested. Thereupon, said officer shall forthwith release the person arrested from custody.

Those provisions do not apply to the violation in this case since the privilege of release is expressly limited to violations of Burns Ind. Stat. Ann. IC 9-4-1-1 to -138 (1973 Cd.ed.).

Even if it did apply, a search still would have been proper. The arrest was a custodial arrest. Although it is true that the arresting officer had no right to continued custody of the driver, he did have a right to temporary custody. That "right" was based upon probable cause to believe there had been a violation

of the law. The driver was, in fact, in the custody of the arresting officer because of the arrest. The movements of the driver of the vehicle were restricted, and force could have been used, if necessary, to enforce that restriction. The facts of this case dispel any doubt that the danger to an arresting officer is as great in a "temporary custody" arrest as in any custodial arrest situation. There is no reason to retreat from the statement in United States v. Robinson, supra, that "(i)t is the fact of a lawful arrest which establishes the authority to search." Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) does not present any more cogent a

standard to test searches incident to arrests which permit only temporary custody than it does with respect to arrests of longer termed duration. It is evident that the Indiana General Assembly did not intend that provisions for release of violators of certain motor vehicle regulations would restrict an arresting officer's handling of the violators in custody. The General Assembly expressly provided that action may be taken against the arresting officer for abrogation of the privilege. See Burns Ind.Stat.Ann. IC 9-4-1-131 (e) (1973 Cd.ed).

The defendant's attempt to suppress all evidence taken from the vehicle and evidence of the gunfight

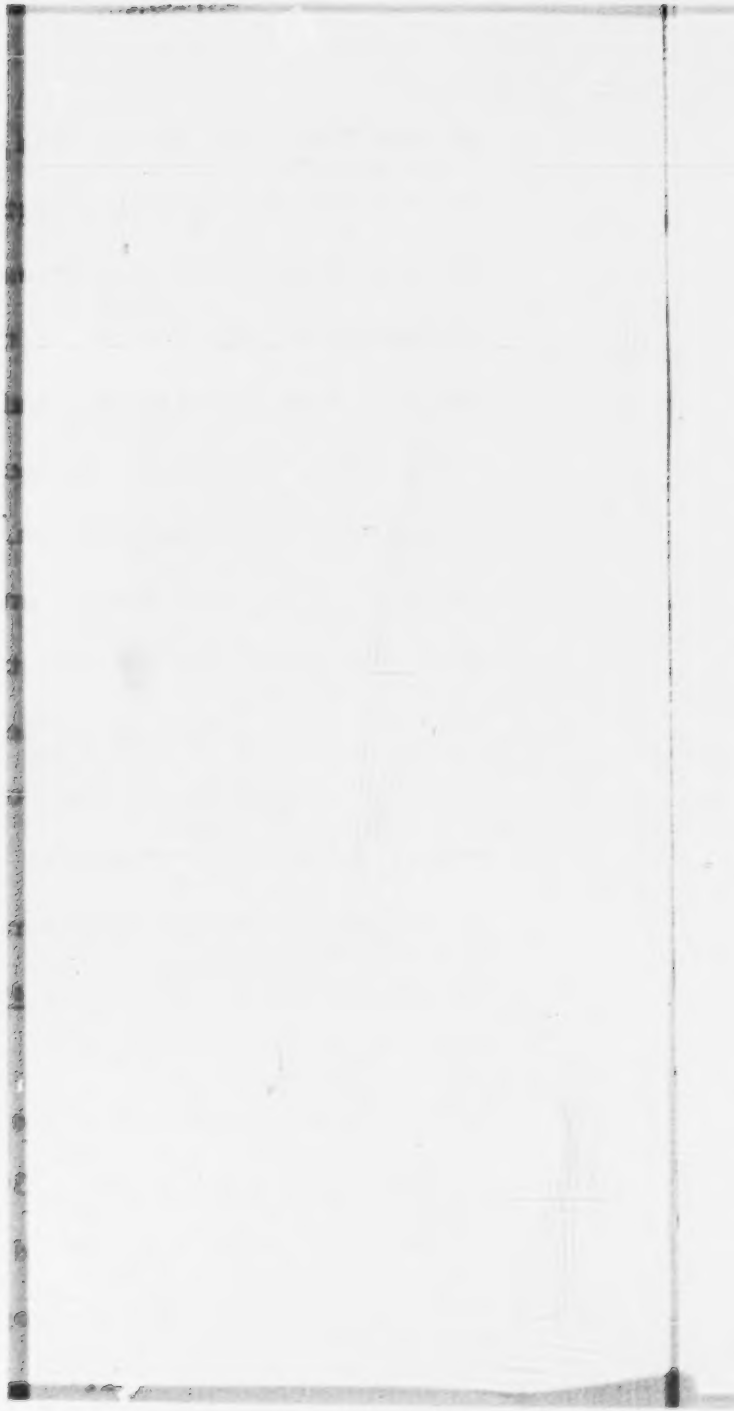
is unrealistic. The only items which could be suppressed, if the defendant were successful, would be the rubber gloves found in the sack. The tire tool was in plain view. A request for a license is a search necessarily concomitant to an arrest for a motor vehicle violation. Evidence of the gunfight could not have been the "fruit" of the search of the automobile. It is not sufficient that evidence would not have been obtained "but for" illegal police conduct. The evidence must have resulted from intentional exploitation of the conduct and not, as here, from the defendant's independant acts. Wong Sun v. United States, 371 U.S. 471, 486-88, 83 S.Ct. 407, 416-18, 9 L.Ed.

2d 441 (1963). Reversal based upon the improper admission of the rubber gloves into evidence would not be warranted since such an error would have been harmless.

II.

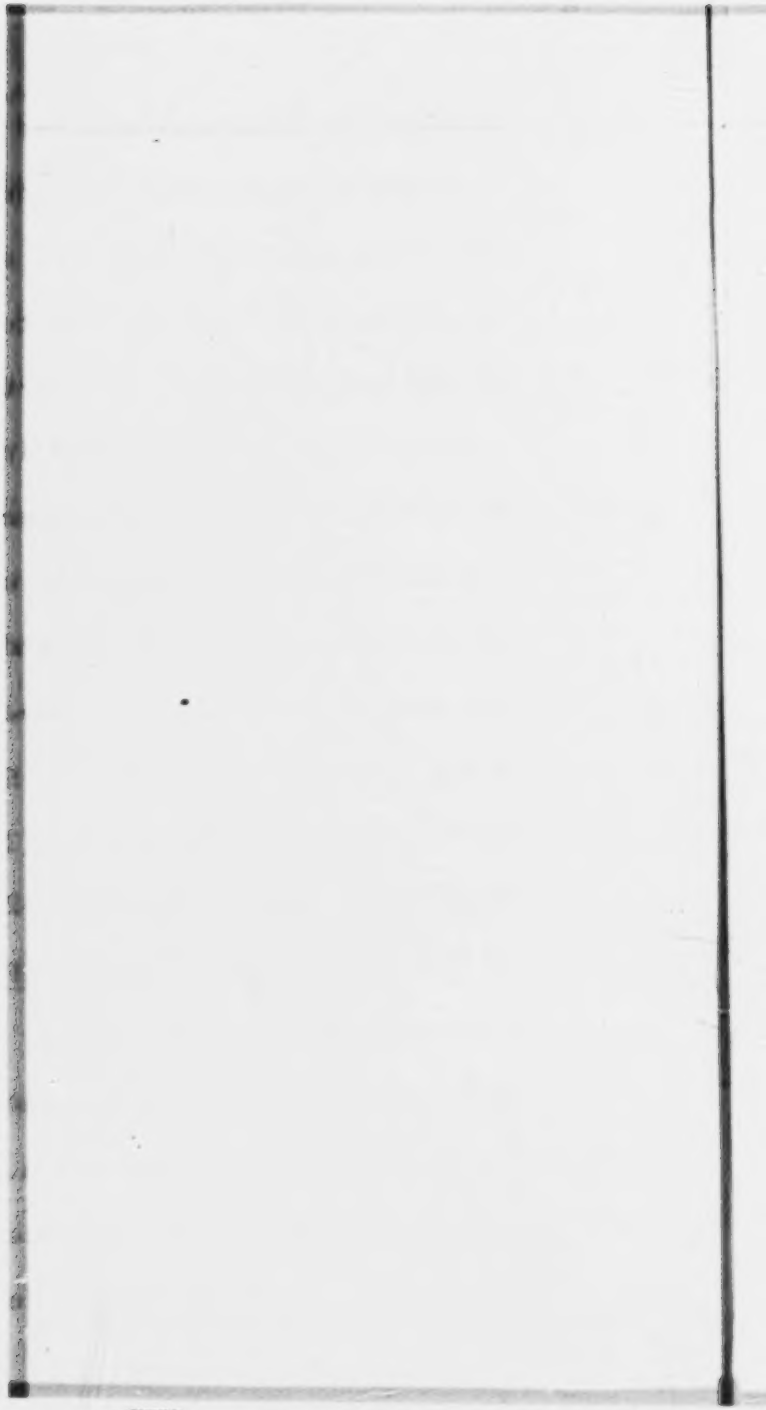
THE ON-THE-SCENE CONFRONTATION WAS NOT IMPERMISSIBLY SUGGESTIVE

The second contention of the petitioner (hereinafter "defendant") is that the confrontation between the defendant and his victims, at the scene of his apprehension, soon after the robbery, was impermissibly suggestive because it singled-out the defendant and because the police biased the confrontation by stating that the defendant was suspected of the robbery. (Petition for Writ of Cert., pp.37-43.) The question to be



answered to determine whether identification procedures on the scene of the crime or arrest were too suggestive is whether, in light of the totality of the circumstances, the on-the-scene confrontation was conducted in a manner so unnecessarily suggestive and conducive to irreparable mistaken identification that the defendant was denied due process. Stovall v. Denno, 388 U.S. 293, 301, 87 S.Ct. 1967, 1972, 18 L.Ed.2d 1199 (1967); Wright v. State, ___Ind.___, 285 N.E. 2d 650, 653 (1972). Rudd v. Florida, 477 F.2d 805 (5th Cir. 1973), is inapposite since it does not deal with an on-the-scene confrontation.

It is improper for police to bias confrontations by focusing identifi-



cation witnesses' attention upon a suspect by stating that the suspect is believed to have committed the crime. Granted argeundo that the police did that in this case, there was no prejudice because the victims knew the defendant and, as one of the victims testified, they were not influenced by anything the police said that night. United States v. Allen, 497 F.2d 160, 163 (5th Cir. 1974); United States v. Anderson, 490 F.2d 785, 787 (D.C. Cir. 1974).

Nevertheless the confrontation was not impermissibly suggestive. The identifications were reinforced by the facts that the defendant and his accomplice were dressed in the manner described by the victims, (Tr.pp.356-

57, 521), and that the defendant's walk and voice seemed distinctly familiar to the victims at the time of the robbery. (Tr.pp.356-57,521.) The exigencies of on-the-scene confrontations and society's strong interest in rapid identifications following crimes justify distinguishing confrontations on the scene of an apprehension of a suspect soon after a crime from "one-on-one" identification procedures arranged in nonexigent circumstances. United States v. Lee, 485 F.2d 1075, 1076-77 (D.C. Cir. 1973). Consequently it is not impermissibly suggestive to seek an identification on the scene of an arrest soon after a crime even though the defendant alone is to be viewed. cf. Stovall v. Denno, supra.

III.

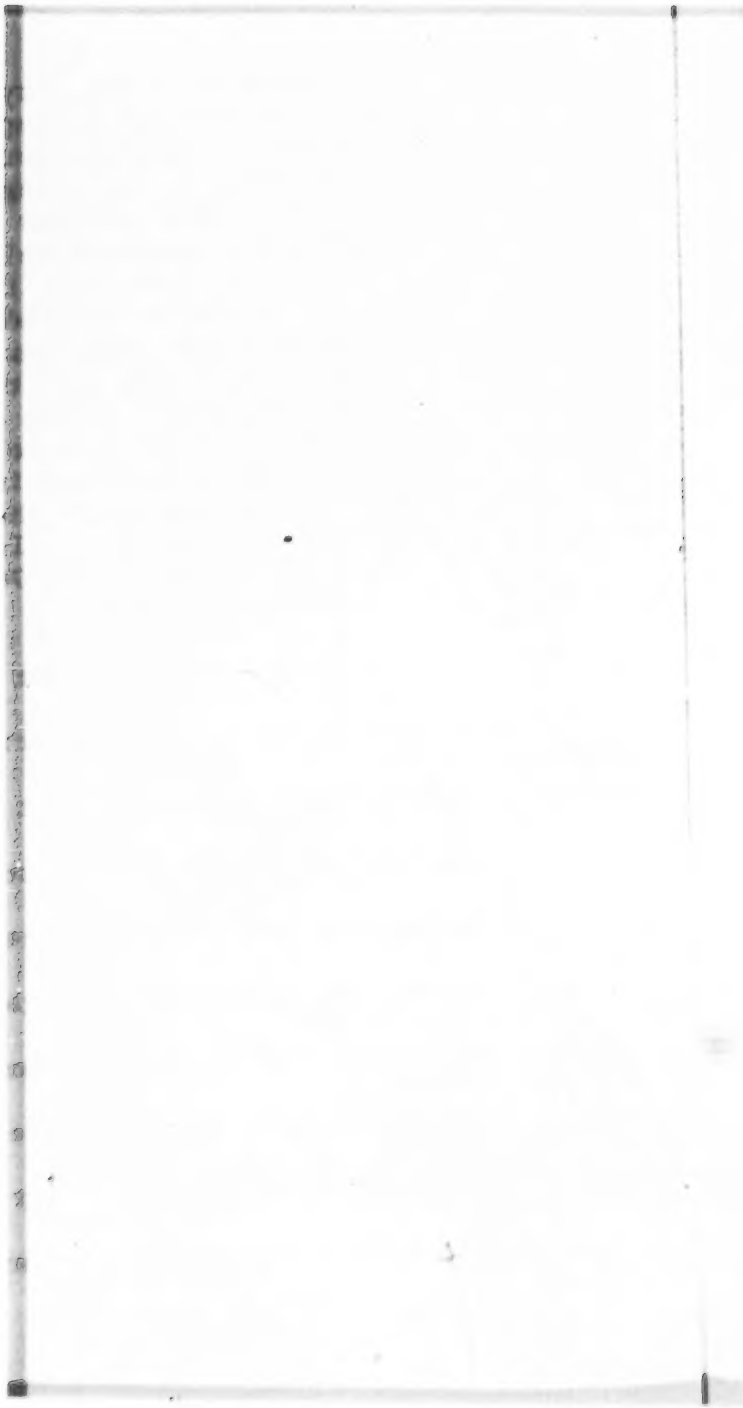
THE BAILIFF'S STATEMENT TO THE JURY DID NOT DENY A FAIR TRIAL

The third contention of the petitioner (hereinafter "defendant") is that the jury was prejudiced by remarks of the bailiff. (Pet. for Writ of Cert., pp.43-49.) The defendant cites no authority in support of his contention and has presented nothing that merits review by the Court. Although the Indiana Supreme Court reviewed the merits of the defendant's contention, it did so in spite of the questionable nature of the record upon which review was sought. Specifically, the Court noted:

> Appellant's attorney has submitted an affidavit that through an undescribed source Appellant's attorney learned during the de-

> liberation of the jury that the bailiff had had an improper conversation with the jury. Specifically, it is alleged that a juror asked whether sentences would run consecutively or concurrently. The bailiff said he would speak to the judge. He did, and the judge instructed him to tell the jury that the question could not be answered. Instead the bailiff told the jury that the sentencing of the defendant was up to the judge. Fraiser v. State, ___Ind.___, 312 N.E.2d 77, 81 (1974); see also Tr.pp.16-18.

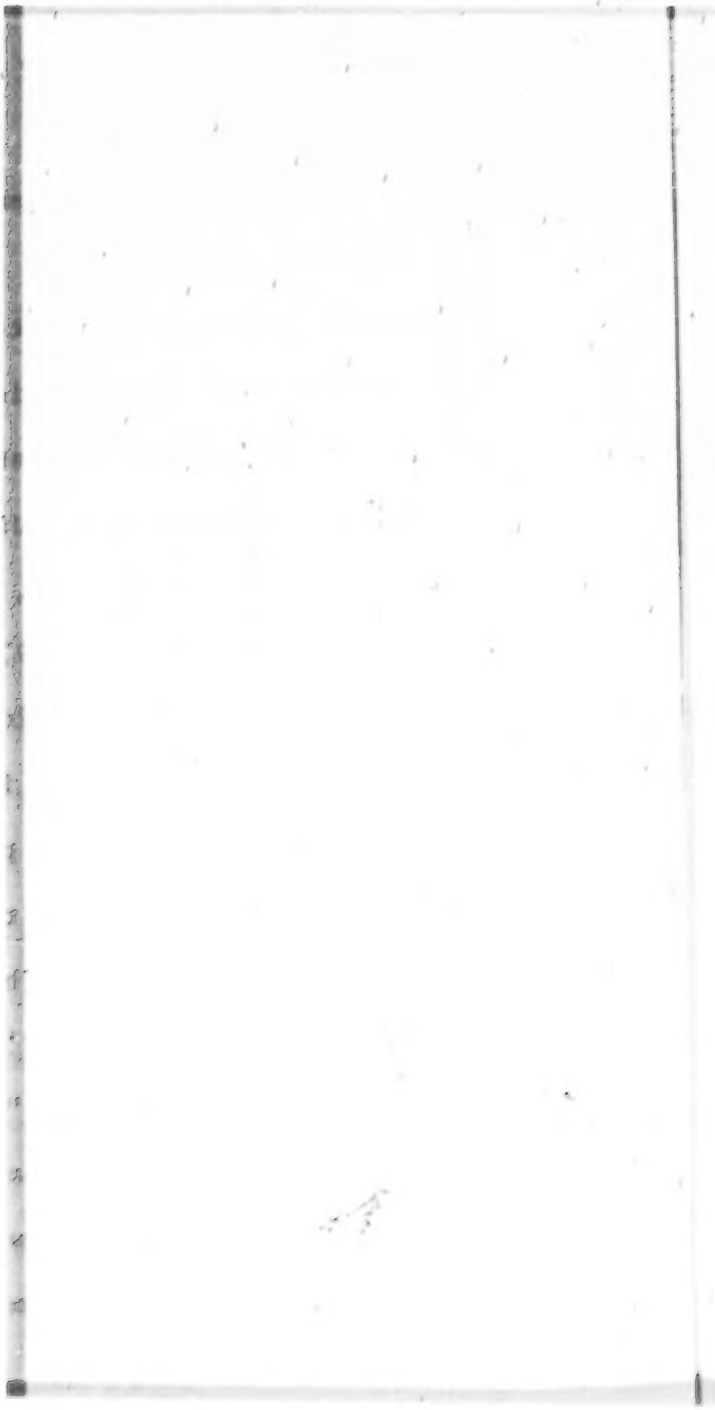
In fact, the defendant was informed of the bailiff's mistake prior to the announcement of the verdict and did not call it to the trial court's attention. As a consequence, there is no concrete evidence regarding the effect of the bailiff's comment. Factually this is not a case in which evidence reached the jury from outside the courtroom. e.g., Parker v.



Gladden, 385 U.S. 363, 87 S.Ct. 468, 17 L.Ed.2d 420 (1966).

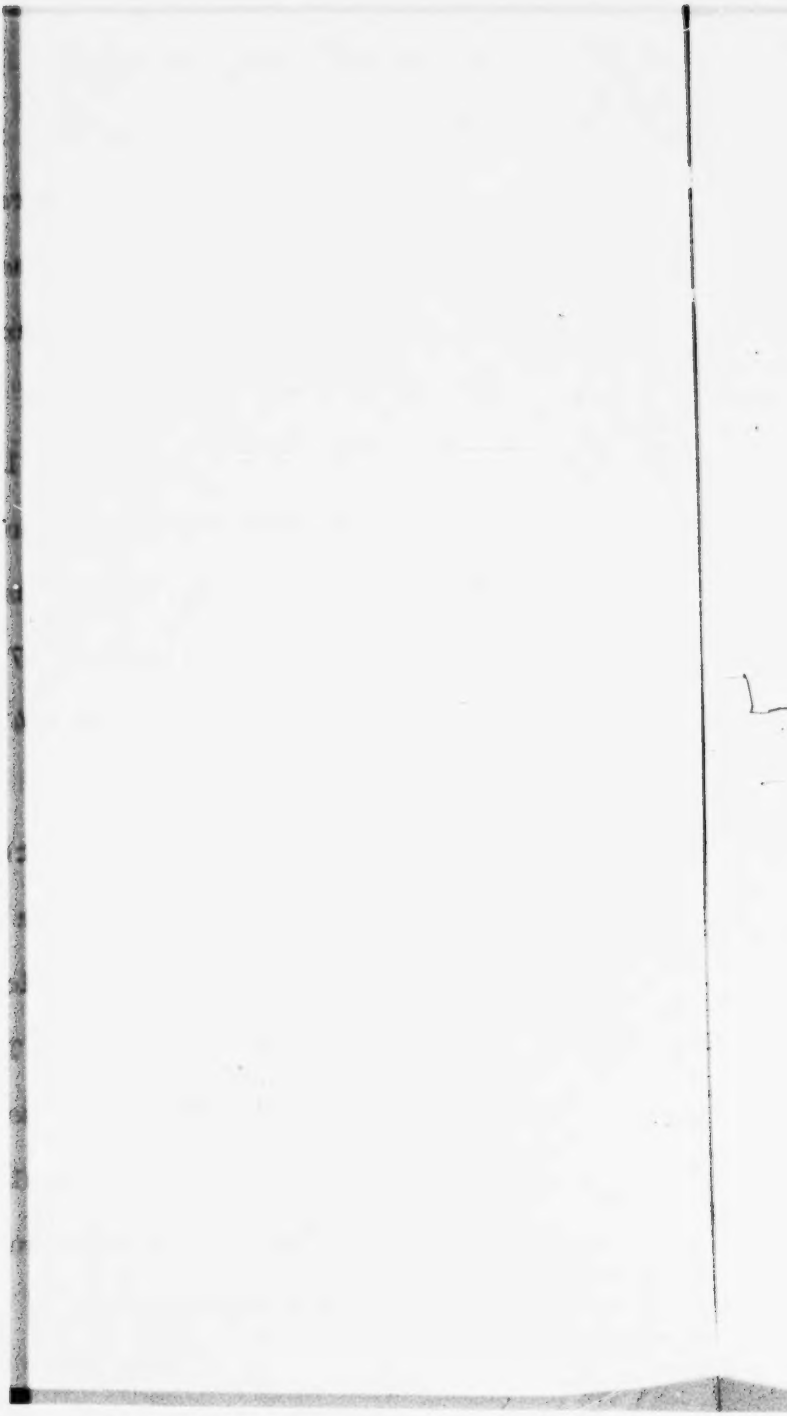
Outside influences impinging upon a jury are presumed to be prejudicial. However, consistent with the weight of authority in other jurisidictions, the rule in Indiana is that the presumption is rebuttable. United States ex rel. Tobe v. Bensinger, 492 F.2d 232, 238 n. 8 (7th Cir. 1974); Frasier v. State, supra, 312 N.E.2d at 81-82.

The record presented in this case sufficiently rebutted the presumption since it demonstrated, as the Indiana Supreme Court concluded, that "'no harm or prejudice resulted' from the misconduct of the bailiff." Alternatively the court could have held that the record presented was insufficient to raise the presumption, since



it merely contained hearsay and did not contain "hard evidence" from jurors stating that they were the objects of outside influences, e.g., Parker v. Gladden, supra; Marshall v. United States, 360 U.S. 310, 312, 79 S.Ct. 1171, 1172, 3 L.Ed.2d 1250 (1959), or from witnesses who indicated that they were "outside influences." e.g., Turner v. Louisiana, 379 U.S. 466, 468-71, 85 S.Ct. 546, 547-49, 13 L.Ed.2d 424 (1965).

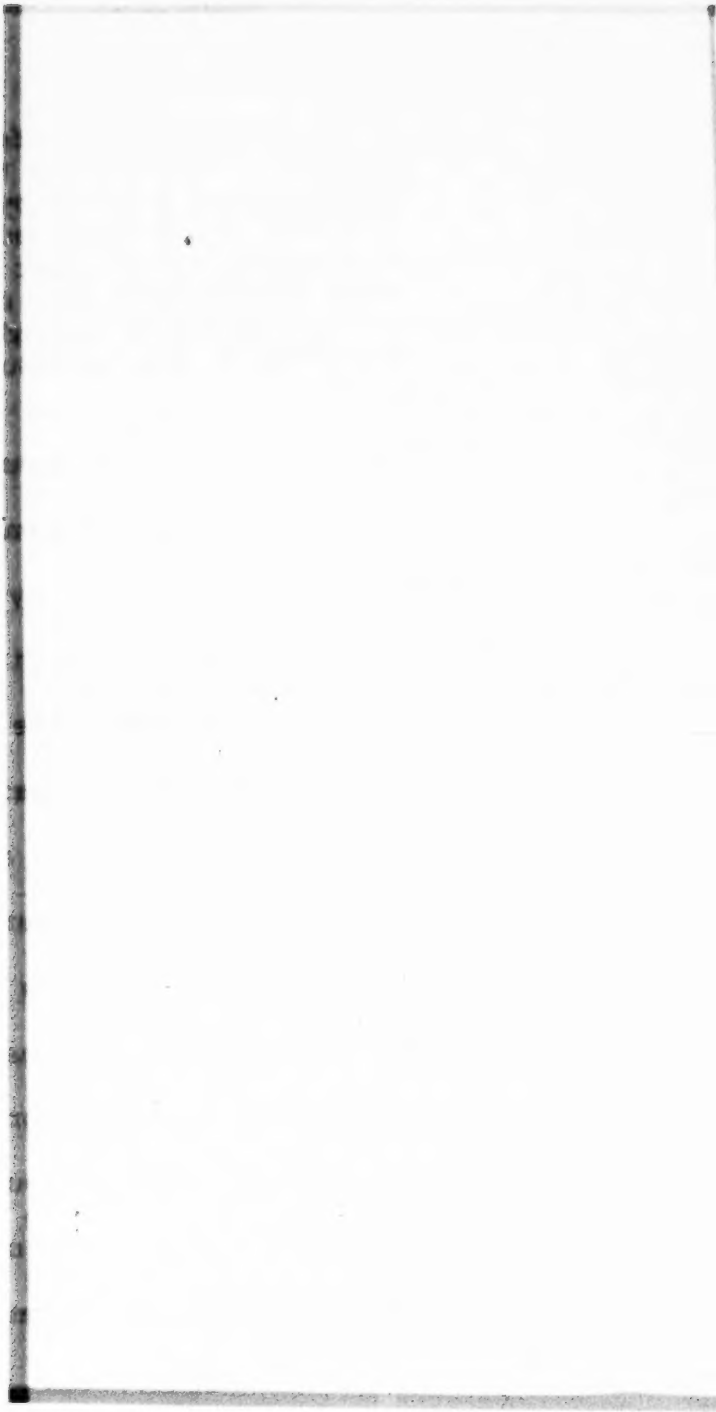
The defendant has submitted nothing that implies that the bailiff's message influenced the decision of the jury with respect to guilt. The information would have been material only to sentencing. So speculative is that defendant's contention that, in the Indiana Supreme Court, the



defendant argued:

> The fact that the defendant received from the jury the maximum sentences allowed by law could very well have been predicated on the jury's view that the Judge would reduce the sentence anyway. (Brief of Defendant-Appellant in the Ind. Sup. Ct., p. 38.)

Granting the defendant's imputation of prejudice, the only reasonable explanation of that action by the jury is that the jury was attempting to persuade the court to impose the maximum sentence. To be balanced against the defendant's bald speculation are the facts that the court had accurately instructed the jury about its sentencing responsibility and that the jury had before it verdict forms which revealed on their faces the punishment to be inflicted. As a consequence the only defensible conclusion that



can be drawn from the record is that the defendant was not prejudiced by the bailiff's mistake. The defendant has a right to "a fair trial by a panel of impartial, 'indifferent,' jurors," Irvin v. Dowd, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961), and the defendant has submitted nothing to indicate that he did not receive such a trial.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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ON BRIEF

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